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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 528

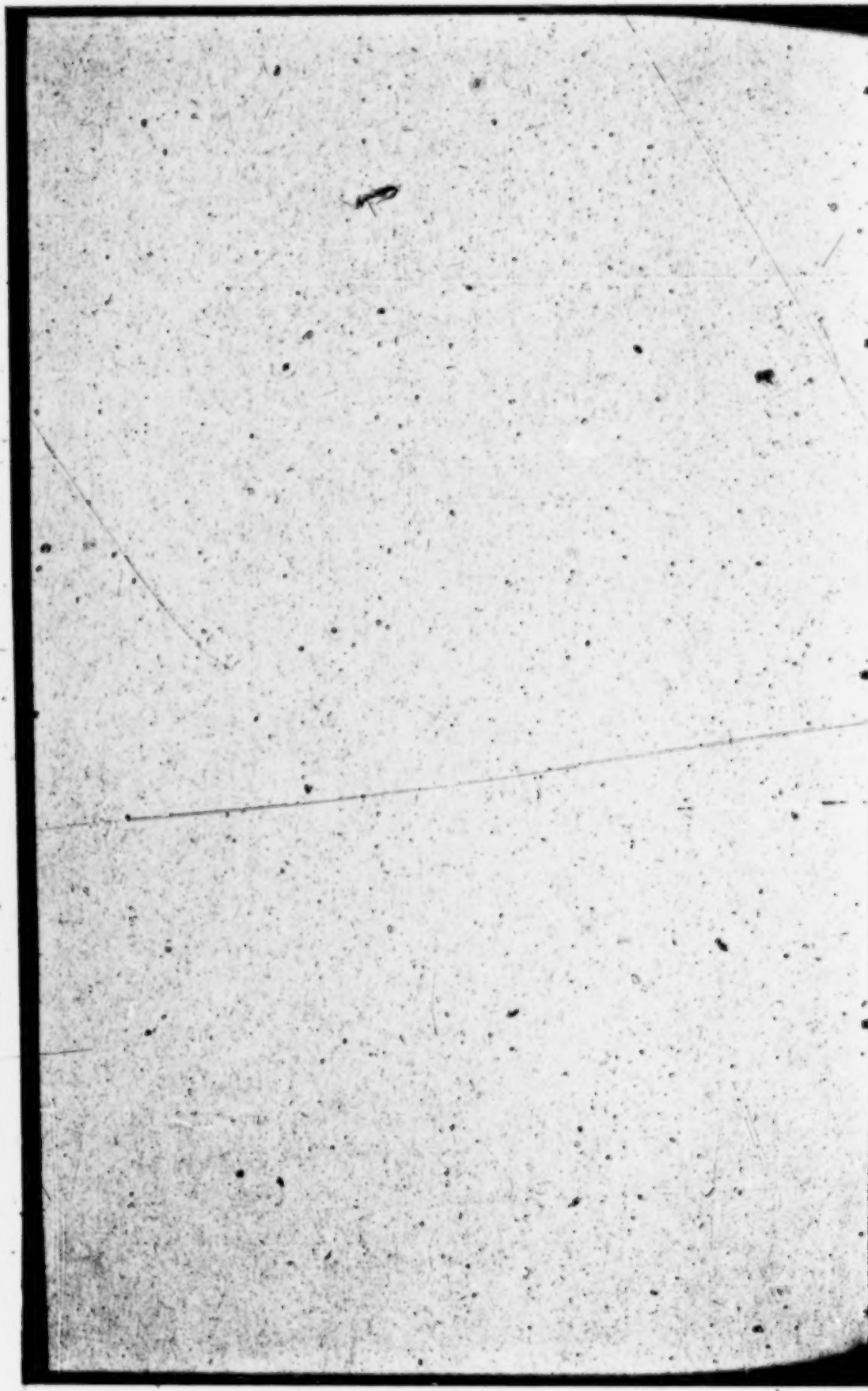
JOSEPH A. BRODERICK, SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, APPELLANT,

vs.

MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, ET AL.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

FILED NOVEMBER 14, 1934.



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IN SUPREME COURT OF NEW JERSEY, ESSEX COUNTY

SUMMONS—Filed Nov. 17, 1933

THE STATE OF NEW JERSEY.

(L. S.)

To Benjamin Abrams, et als. (totaling 557 in number, this appeal involving the following defendants): Charles P. Anderson, Stephen R. Applegate, Hannah C. Bailey, Mrs. Maude A. Bernert, Samuel Berger, George Bierman, Arthur R. Brick, Herbert Cooper, James Mercer Davis, Nicholas W. D'Elia, Alfred R. M. Diggles, John Drewen, Howard Ewart, Frederick D. Fahrenbruck, Katherine L. Fahrenbruck, M. James Fine, Herman Geismar, Paul S. Gobel, Henry J. Goodman, Benjamin Gorlin, Emanuel Gross, William J. Gruler, Kate Harris, Benjamin Heilbrun, Morris Herman, Charles Kanter, Mrs. Gertrude Kapralik, Richard E. Kohn, Eric Korman, Benjamin Levy, Mrs. Camilla Lowy, A. D. MacDougall, Clair MacFarland, J. Paul Neuwirth, Harry E. O'Mealia, Harry F. O'Mealia, Hamilton G. Pedrick, Mary Rosner, Andrew Schwarz, Raymond C. Staples, Alex Steinberger, Essie R. Stone, Frank W. Sutton, Jr., Howard C. Sylvester, Mrs. Mary A. VanNostrand, Dr. Ralph Waldron, Charles N. Warner, William J. Wells, Zulena Cook Woodward, George W. Bauer & George J. Alles, Arney-Sutton-Gruber Co., The Bobdan Co., The Farg Co., Inc., The Mart, Inc., Northern N. J. Investment Co., Omaco Securities Co., O'Mealia Outdoor Advertising Co., Sutton Brothers Co., Toms River Amusement Co.

[fol. 2] You are summoned to answer the annexed complaint of Joseph A. Broderick, as Superintendent of Banks of the State of New York, in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed com-

plaint, the plaintiff may proceed in the suit, and judgment may be entered against you. (See notice.)

WITNESS, Honorable Thomas J. Brogan, Chief Justice of the New Jersey Supreme Court, at Trenton, this 13th day of November, Nineteen Hundred and Thirty-Three.

Fred L. Bloodgood, Clerk. McDermott, Enright & Carpenter, Attorneys.

[fol. 3] IN SUPREME COURT OF NEW JERSEY, ESSEX COUNTY

Action at law

JOSEPH A. BRODERICK, as Superintendent of Banks of the State of New York, Plaintiff,

against

BENJAMIN ABRAMS et als. (totaling 557 in number, this appeal involving the following defendants) Charles P. Anderson, Stephen R. Applegate, Hannah C. Bailey, Mrs. Maude A. Benkert, Samuel Berger, George Bierman, Arthur R. Brick, Herbert Cooper, James Mercer Davis, Nicholas W. D'Elia, Alfred R. M. Diggles, John Drewen, Howard Ewart, Frederick D. Fahrenbruck, Katherine L. Fahrenbruck, M. James Fine, Herman Geismar, Paul S. Goble, Henry J. Goodman, Bejamin Gorlin, Emanuel Gross, William J. Gruler, Kate Harris, Benjamin Heilbrun, Morris Herman, Charles Kanter, Mrs. Gertrude Kapralik, Richard E. Kohn, Eric Korman, Benjamin Levy, Mrs. Camilla Lowy, A. D. MacDougall, Clair MacFarland, J. Paul Neuwirth, Harry E. O'Mealia, Harry F. O'Mealia, Hamilton G. Pedrick, Mary Rosner, Andrew Schwarz, Raymond C. Staples, Alex Steinberger, Essie [fol. 4] R. Stone, Frank W. Sutton, Jr., Howard C. Sylvester, Mrs. Mary A. VanNostrand, Dr. Ralph Waldron, Charles N. Warner, William J. Wells, Zulena Cook Woodward (Defendants who are joint owners); George W. Bauer & George J. Alles, (Corporate defendants); Arney-Sutton-Gruler Co.; The Bobdan Co.; The Farg Co. Inc.; The Mart, Inc.; Northern N. J. Investment Co.; Omaco Securities Co.; O'Mealia Outdoor Advertising Co.; Sutton Brothers Co.; Toms River Amusement Co., Defendants.

COMPLAINT

Plaintiff, Joseph A. Broderick, as Superintendent of Banks of the State of New York, complaining against the defendants, says that:

First Count:

1. Plaintiff is a resident and citizen of the State of New York, and on and prior to the 11th day of December, 1930, was and now is the duly appointed and acting Superintendent of Banks of the State of New York.

2. The Bank of United States is a moneyed corporation, organized under the Banking Law of the State of New [fol. 5] York, and maintained its office and principal place of business in the Borough of Manhattan, City, County and State of New York.

On December 11, 1930, the capital of The Bank of United States amounted to the sum of $25,250,000, represented by 1,010,000 shares of the par value of $25.00 per share, all of which was at the times herein referred to and now is issued and outstanding. Said stock was owned by 20,843 stockholders residing in nearly every State of the United States, and also residing in Cuba, Greece, Switzerland, France, Monaco, Panama, Roumania, Jugo-Slavia and Italy.

3. On the 11th day of December, 1930, The Bank of United States could not with safety and expediency continue its business, and thereupon on said date, the plaintiff took possession of the business and property of said Bank, and has been and now is in possession and engaged in the liquidation thereof, which action was taken pursuant to Section 57 of an Act of the Legislature of the State of New York entitled "An Act in relation to banking corporations, and individuals, partnerships, unincorporated associations and corporations under the supervision of the banking department, constituting Chapter Two of the Consolidated Laws" (Laws 1914, Chap. 369) which provides as follows:

"The superintendent may forthwith take possession of the business and property of any corporation to which this chapter is applicable, or any personal loan broker, or any private banker to which article four of this chapter is applicable whenever it shall appear that such corporation or banker:

[fol. 6] 1. Has violated its charter or any law;

2. Is conducting its business in an unauthorized or unsafe manner;

3. Is in an unsound or unsafe condition to transact its business;

4. Cannot with safety and expediency continue business;

5. Has an impairment of its capital;

6. Has suspended payment of its obligations;

7. Has neglected or refused to comply with the terms of a duly issued order of the superintendent;

8. Has refused, upon proper demand, to submit its records and affairs for inspection to an examiner of the banking department;

9. Has refused to be examined upon oath regarding its affairs."

4. Prior to the 6th day of May, 1931, plaintiff determined to liquidate the affairs of The Bank of United States and thereafter pursuant to Section 72 of the said Banking Law of the State of New York and on or about said 6th day of May, 1931, plaintiff notified all creditors in writing, whose names appeared as creditors upon the books of such bank. to present their claims to him and make proper proof thereof on or before the 29th day of June, 1931, at various branch banks of The Bank of United States situate in the City of New York, the names and addresses of which were specified in such notice. Such notice designated June 29th, [fol. 7] 1931, as the last day upon which claims could be presented and proved, and were enclosed in securely sealed envelopes, with postage prepaid, addressed to the creditors appearing on the books of such Bank, and were on or about May 6th, 1931, mailed to such creditors at the General Post Office in the Borough of Manhattan, City of New York. Thereafter such notice was inserted and published weekly, pursuant to the direction of the plaintiff, in thirty-nine newspapers designated by him and published in the City of New York, for more than three consecutive weeks and embracing a period of more than twenty-one days prior to the 29th day of June, 1931, the last day fixed in said notice

for the presentation and making proof of claims as hereinbefore alleged.

5. Subsequent to the 29th day of June, 1931, and prior to July 1st, 1932, plaintiff, after an examination of its affairs, determined and ascertained that the reasonable value of the assets of The Bank of United States was not sufficient to pay its creditors in full, and that there was due and owing by such Bank to its depositors and creditors for moneys received and due and unpaid upon deposit accounts and other moneys owing, for value received, upon its contracts, debts and engagements a sum in excess of $30,000,000 over and above the reasonable value of such assets. Upon information and belief at the time of such determination such insufficiency of assets, as so fixed and ascertained, existed and has since continued.

The creditors of The Bank of United States aggregate over four hundred thousand and are scattered throughout the United States and foreign countries and beyond the [fol. 8] reach of process of the Courts of this State.

6. Article VIII, Section 7 of the Constitution of the State of New York, provides as follows:

"The stockholders of every corporation and joint-stock association for banking purposes, shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind."

7. Section 80 of the said banking law of the State of New York provides as follows:

"Whenever a liability of stockholders for the amount of their respective shares of any such corporation exists, and the superintendent has duly taken possession of the property and business of such corporation, and has duly notified creditors to present and make proof of their respective claims and the last day to present such claims has expired, and he has determined from his examination of its affairs that the reasonable value of the assets of such corporation is not sufficient to pay its creditors in full, he may enforce the individual liability of such stockholders in whole or in part. In case he determines to enforce such liability, he shall make demand in writing upon such stockholders by causing such demand to be enclosed in sealed envelopes

addressed and mailed, postage prepaid, to said respective stockholders at their last known places of address as the same appear upon the stock ledger of such corporation or at their last known address if no address appears in said [fol. 9] ledger. Such demand shall state the total amount assessed by the superintendent against the stockholders and the equal and pro rata share assessed against each stockholder for each share of stock, and the total amount of such assessment for all the shares of stock of such stockholder. Such demand shall also fix a date, not earlier than thirty days from the date of such notice, upon which such stockholder shall be required to pay such assessment to the superintendent. In case any such stockholder shall fail or neglect to pay such assessment within the time fixed in said notice, the superintendent shall have a cause of action, in his own name as superintendent of banks, against such stockholder either severally or jointly with other stockholders of such corporation, for the amount of such unpaid assessment or assessments, together with interest thereon from the date when such assessment was, by the terms of said notice, due and payable. In any such action, the written statement of the superintendent, under his hand and seal of office, reciting his determination to enforce the individual liability, or any part thereof, of such stockholders, and setting forth the value of the assets of such corporation and the liabilities thereof, as determined by him after examination and investigation, shall be presumptive evidence of such facts as therein stated."

8. Subsequent to such determination and prior to the 1st day of July, 1932, plaintiff decided that an assessment of $25.00 against each stockholder for each share of stock held by him was required and necessary to provide moneys [fol. 10] toward the payment and satisfaction of the sums due and owing to the creditors of such Bank.

9. Thereafter and on or about July 1st, 1932, plaintiff made demand in writing upon all the stockholders of The Bank of United States appearing upon its stock ledger for the payment on August 8th, 1932, of $25.00 for each share of stock appearing upon such stock ledger to be held by each stockholder. A form or sample copy of such demand, except as to the name and address of the stockholder and the total amount assessed against him, is hereto annexed,

marked Schedule 1, and made a part hereof. Such demand stated the total amount assessed by the plaintiff against all of the stockholders, the equal and pro rata share assessed against each stockholder for each share of stock held by him, and the total amount of the assessment for all shares held by each such stockholder. Such demands were enclosed in securely sealed postpaid envelopes, addressed to each of such stockholders (including all named as defendants herein) at his, her or its last known place of residence appearing upon the stock ledger of the Bank, and where no address appeared thereon, the last known address of such stockholder. Such demands so sealed and addressed and postage paid thereon were on July 1st, 1932, mailed to each said stockholder at the General Post Office in the Borough of Manhattan, City of New York.

10. Section 120 of said banking law of the State of New York, provides as follows:

"The rights, powers and duties of stockholders of banks shall be as prescribed in the general corporation law and [fol. 11] the stock corporation law; but the individual liability of such stockholders for the contracts, debts, and engagement of the bank and the time within which an action may be instituted to enforce such liability shall be governed exclusively by the provisions of this section and section e-ghty of this chapter.

The stockholders of every bank shall be individually responsible, equally and ratably and not one for another, for all contracts, debts and engagements of the bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. An action to enforce such liability must be brought within six years after the cause of action has accrued. The term 'stockholder' as used in this section shall apply to:

1. Such persons as appear by the books of the bank to be stockholders;

2. Every owner of stock, legal or equitable, although the same may be on such books in the name of another person, provided, however, that such term shall not apply to a person holding stock as collateral security for the payment of a debt and not appearing by the books of the bank to be the owner and holder thereof in his own right, or to a per-

son holding stock in a bona fide fiduciary capacity and not appearing by the books of the bank to be the owner and holder thereof in his own right unless such fiduciary shall have invested the funds in his care in violation of law or of the terms under which said funds are held by him, in [fol. 12] which case he shall be personally liable as a stockholder.

No person who has in good faith, and without any intent to evade his liability as a stockholder, caused his stock to be transferred on the books of the bank when such bank is solvent to any resident of this State of full age previous to any default in the payment of any debt or liability of the bank, shall be subject to any personal liability for any contracts, debts or engagements of the Bank.

In case the Superintendent of Banks shall have taken possession of the property and business of the bank pursuant to section fifty-seven of this chapter or a permanent receiver of such bank shall have been appointed, all actions or proceedings to enforce the liability of stockholders under this section shall be taken and prosecuted only in the name of the superintendent or the receiver, as the case may be, unless the superintendent or receiver shall refuse to take such action or proceeding upon proper request in writing made by any creditor, or shall have failed or neglected to commence such action or proceeding within sixty days after the receipt of such request, and in that event such action or proceeding may be taken by any creditor of the bank. But no such action shall be brought by a creditor until a judgment shall have been recovered by him against the bank and an execution thereon shall have been returned unsatisfied in whole or in part."

11. On and prior to December 11, 1930, each of the defendants named in Schedule 2 hereto annexed appeared and now appears upon the stock ledger of The Bank of United [fol. 13] States as the owner and holder of the number of shares set opposite their respective names upon Schedule 2, which is annexed hereto and made a part hereof with the same force and effect as though repeated herein at length.

12. Each of the defendants has failed and neglected to pay the amount of the assessment so levied and imposed.

Plaintiff demands judgment against each of the defendants named in Schedule 2 hereto attached for the amount

so specified opposite his, her or its respective name upon Schedule 2 with interest thereon from August 8, 1932, and costs of suit to be taxed.

Second Count

1. Plaintiff repeats each and every allegation contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the First Count.

2. On and prior to December 11, 1930, each of the defendants referred to in Schedule 3, which is hereto annexed and made a part hereof with the same force and effect as though repeated herein at length, was the equitable owner and holder of the number of shares of stock of The Bank of United States set opposite their respective names in said schedule.

3. The defendant Benjamin Chodosh shown in said schedule on or about September 17, 1930, purchased five shares of said stock from Minnie Chodosh (now Minnie C. Kaplan), but did not have the said shares transferred to his own name on the books of the said Bank.

[fol. 14] 4. The defendant George Eisenberg purchased forty shares of stock of the said Bank from Benjamin Levy of 95 River Street, Hoboken, N. J., prior to December 11, 1930, but did not have said shares of stock transferred to his own name on the books of the said Bank.

5. The defendant Morris Krumholtz purchased fifteen shares of said stock in said Bank June 6, 1930, and had the same placed of record on the books of the Bank in the name of Irving Weinstein as nominee for the said Morris Krumholtz.

6. The defendant Stern Securities Corporation was in truth and in fact the owner of two hundred and sixty-seven shares of stock of the said Bank, which stood on the books of the Bank in the name of Eric Korman as owner, the said Korman being nomine for the said Stern Securities Corporation.

7. Each of the said defendants has failed and neglected to pay the amount of the assessment so levied and imposed, although duly notified thereof and payment demanded.

Plaintiff demands judgment against each of the said defendants set forth in Schedule 3 for the amounts so specified opposite his, her or its names upon said schedule, with interest thereon from August 8, 1932, and costs of suit to be taxed.

McDermott, Enright & Carpenter, Attorneys for Plaintiff, 75 Montgomery Street, Jersey City, N. J.

[fol. 15] SCHEDULE 1 TO COMPLAINT

No.

July 6, 1932.

Please Take Notice: The last day to present claims having expired, I have determined from my examination of the affairs of The Bank of United States that the reasonable value of its assets is not sufficient to pay its creditors in full.

Pursuant to Section 80 of the Banking Law, I have assessed the sum of 25,250,000.00 Dollars against the stockholders of The Bank of the United States, the pro rata share of said asessment against each stockholder on each share of stock being $25.00.

The total assessment against you as holder of ..... shares of stock is $.....

I demand that you pay to me, on the 8th day of August, 1932, at 701 Eighth Avenue, Borough of Manhattan, City of New York, the total assessment made against you.

Joseph A. Broderick, Superintendent of Banks of the State of New York in charge of The Bank of United States in liquidation.

[fol. 16] SCHEDULE 2 TO COMPLAINT

Individuals

Name of stockholder	No. of shares	Amount of assessment
Anderson, Charles P.	180	$4,500.
Applegate, Stephen R.	100	2,500.
Bailey, Hannah C.	2	50.
Benkert, Mrs. Maude A.	75	1,875.
Berger, Samuel	50	1,250.
Bierman, George	67	1,675.
Brick, Arthur R.	10	250.

Name of stockholder	No. of shares		Amount of assessment
Cooper, Herbert	60		1,500.
Davis, James Mercer	25		625.
D'Elia, Nicholas W.	95		2,375.
Diggles, Alfred R. M.	3		75.
Drewen, John	18		450.
Ewart, Howard	50		1,250.
Fahrenbruck, Frederick D.	2		50.
Fahrenbruck, Katherine L.	2		50.
Fine, M. James	10		250.
Geismar, Herman	50		1,250.
Goble, Paul S. (M. D.)	5		125.
Goodman, Henry J.	20		500.
Gorlin, Benjamin	20		500.
Gross, Emanuel	60		1,500.
Gruler, William J.	30		750.
Harris, Kate	19		475.
Heilbrun, Benjamin	10		250.
Herman, Morris	20		500.
[fol. 17] Kanter, Charles	10		250.
Kapralik, Mrs. Gertrude	30	Balance	730.
Kohn, Richard E.	75		1,875.
Korman, Eric	267		6,675.
Levy, Benjamin	40		1,000.
Lowry, Mrs. Camilla	5		125.
MacDougall, A. D.	47		1,175.
MacFarland, Clair	20		500.
Neuwirth, J. Paul	20		500.
O'Mealia, Harry E.	50		1,250.
O'Mealia, Harry F.	10		250.
Pedrick, Hamilton G.	60		1,500.
Rosner, Mary	56		1,400.
Schwarz, Andrew	100		2,500.
Staples, Raymond C.	5		125.
Steinberger, Alex	5		125.
Stone, Essie R.	27		675.

Name of stockholder	No. of shares	Amount of assessment
Sutton, Frank W., Jr.	100	2,500.
Sylvester, Howard C.	80	2,000.
Van Nostrand, Mrs. Mary A.	30	750.
Waldron, Dr. Ralph	150	3,750.
Warner, Charles N.	100	2,500.
Wells, William J.	12	300.
Woodward, Zulena Cook	18	450.
[fol. 18] Joint Owners		
George W. Bauer & George J. Alles	100	2,500.
Corporations		
Arney-Sutton-Gruler Co.	10	250.
The Bobdan Co.	388	9,700.
The Farg Co., Inc.	100	2,500.
The Mart, Inc.	50	1,250.
Northern N. J. Investment Co.	20	500.
Omaco Securities Co.	20	500.
O'Mealia Outdoor Advertising Co.	10	250.
Sutton Brothers Co.	10	250.
Toms River Amusement Co.	50	1,250.

NOTE:—Schedule 2 annexed to the original complaint includes the names, number of shares and amount of assessment of all the 557 defendants. To reduce the record on appeal only the defendants included in this appeal have been set forth in the foregoing schedule.

[fol. 19] IN SUPREME COURT OF NEW JERSEY, ESSEX COUNTY

[Title omitted]

NOTICE OF MOTION BY DEFENDANT, THE BOBDON COMPANY, TO STRIKE OUT COMPLAINT

To McDermott, Enright & Carpenter, Esqs., Attorneys for Plaintiff:

Please Take Notice, that on Saturday, the 9th day of December, 1933, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, at the Essex County

Court House in the City of Newark, County of Essex and State of New Jersey, on behalf of the defendant, The Bobdon Company, we shall apply to the Honorable Charles W. Parker, Supreme Court Justice, to strike the plaintiff's complaint herein on the following grounds:

1. That the complaint does not set forth facts sufficient to constitute a cause of action against the said defendant.

2. That the alleged liability of the said defendant set forth in the complaint filed herein is not enforceable in the courts of this State.

[fol. 20] 3. That the within action cannot be maintained in this Court, in that it is contrary to and violative of the provisions of Section 94 (b) of the Corporation Act (2 Comp. Stats. p. 1656, Sec. 94 (b), which prohiibts the maintenance of an action in a court of law of this State for the enforcement of any statutory personal liability of a stockholder of any foreign corporation.

4. That the complaint does not allege facts sufficient to constitute a cause of action against the defendant under the laws of the State of New York.

Harrison & Roche, Attorneys of Defendant, The Bobdon Company. Chamberlain, Kafer, Wilds & Jube, Esqs., of Counsel, 2 Rector Street, New York, N. Y.

[fol. 21] In Supreme Court of New Jersey, Essex County

[Title omitted]

Notice of Motion by Mary Rosner et al. to Strike Out Complaint

To McDermott, Enright & Carpenter, Esqs., Attorneys of Plaintiff:

Take Notice, that on Saturday, the 9th day of December, 1933, at 9:30 o'clock in the forenoon, at the Essex County Court House, in the City of Newark, in the County of Essex in this state, on behalf of the defendants, Mary Rosner, Essie R. Stone, Camilla Lowy, Ralph Waldron, J. Paul Neuwirth, Richard E. Kohn, George Bierman, Samuel Berger, William J. Wells, M. James Fine and

Kate Harris, we shall apply to the Honorable Charles W. Parker, Supreme Court Justice, to strike out the plaintiff's complaint herein on the following grounds:

1. That the complaint does not set forth any cause of action against the said defendants or any of them.

2. That the alleged liability of the said defendants, set forth in the complaint, is not enforceable in the courts of this state.

[fol. 22] 3. That the laws of this state prohibit the maintenance of this action in this court.

4. That the alleged causes of action set forth in the complaint, as against each of said defendants is, as to each of said defendants several, separate and distinct, and that each of said defendants is misjoined as a defendant in this action with each and all of the other defendants.

5. That the complaint does not set forth any cause of action against said defendants, or any of them, under the laws of the State of New York.

6. That the complaint does not set forth any cause of action which is cognizable in a court of law.

Bilder, Bilder & Kaufman, Attorneys for Above Mentioned Defendants.

Dated, December 4, 1933.

NOTE.—Notices of similar content were served by attorneys for the remaining appellees.

[fol. 23] IN SUPREME COURT OF NEW JERSEY

JOSEPH A. BRODERICK, as Superintendent of Banks of the State of New York, Plaintiff,

vs.

BENJAMIN ABRAMS et als., Defendants

On motions by various defendants, to strike out the complaint as to them respectively.

Before Justice Parker, at Chambers.

For the plaintiff, McDermott, Enright & Carpenter.

(Arthur Ofner, of the New York bar, on the brief.)

For the various moving defendants, Walter J. Bilder: Eichmann & Seiden: Howard Ewart: Gross & Gross: Harrison & Roche: Lichtenstein, Schwartz & Friedenberg.

OPINION—Filed Jan. 30, 1934

PARKER, J.:

One of the grounds originally urged was misjoinder of parties, the facts being that several hundred defendants have been joined in what is nominally one action, but several hundred actions combined for convenience, as [fol. 24] stockholders of the defunct Bank of the United States, and are severally charged with individual liability to the extent of the par value of the shares held by them respectively.

I disposed of this objection in another case a few weeks ago. See Beatty v. Lincoln Bus Co., memorandum filed December 11, 1933. Up to this writing that opinion does not seem to have been reported.

The other principal ground is that by the statute of 1897, (Section 94 b of the Corporation Act as reprinted in Compiled Statutes,) it is enacted that "no action or proceeding shall be maintained in any court of law of this state against any stockholder, * * * of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, * * * for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, * * * if such statutory personal liability be created by or arose from the statutes or laws of any other state or foreign country, and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in the nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be parties." (C. S. 1656.)

The proposition advanced by the defendants is that this statute, which it is admitted was in existence in New Jersey before the organization of the Bank of the United States, bars any such action as the present one, which is

[fol. 25] by a quasi receiver not appointed by any court but ex officio pursuant to statute, and for the benefit of all the creditors (and principally the depositors) of the defunct Bank of the United States.

One answer made to this by plaintiff is that the case is not within the language of the statute. Another answer made is that if it is within the language of the statute, there is an impairment of the obligation of a contract. A third answer made seems to be that to deny the right of action in this case would be in defiance of the full faith and credit clause of the United States constitution.

An abstract of the complainant is perhaps necessary. It is in two counts but they are both alike, except that the second count merely charges certain "equitable" owners of shares with the alleged responsibility for one hundred per cent assessment; whereas the first count relates to the "legal" owners who are in far greater number.

The averments are that plaintiff is and was on December 11, 1930 the Superintendent of Banks of the State of New York; that the Bank of the United States is a corporation organized under the banking law of that State and doing business in the City of New York; that its capital amounted to $25,000,000, and the stock was owned by nearly 21,000 stockholders all over the United States and in foreign countries; that on December 11, 1930, by virtue of the banking law and in view of the financial condition of the bank, the plaintiff as New York Superintendent of Banks took possession of its business and property and is engaged in liquidating the institution pursuant to Section 57 of the New York banking law of 1914. We need not go into details as to the ground assigned for his action as no question is now raised on that score.

[fol. 26] Paragraphs 4 and 5 of the complaint go on to say that on May 6, 1931, pursuant to Section 72, plaintiff gave notice to the creditors to present their claims, which notices were mailed and advertised and that the time for presentation expired on June 29th, whereupon the plaintiff determined that the assessments were not sufficient to pay the creditors in full and that there was due by the Bank to Depositors and creditors a sum in excess of $30,000,000 over the reasonable value of assets, which deficiency still exists. That amount is in excess of the par value of all the stock.

Paragraph 6 of the complaint quotes the statute of New York which provides that "the stockholders of every corporation and joint-stock association for banking purposes, shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind."

Paragraph 7 quotes Section 80 of the same Banking law to the effect that whenever a liability as above exists, and the superintendent has taken possession and has notified creditors to present their claims, and the time to present claims has expired, and he has determined from his examination that the reasonable value of the assets is not sufficient to pay in full, he may enforce the individual liability of such stockholders in whole or in part. Then follow a number of provisions about making demand on the stockholders, and what the demand shall contain, and how it shall be made, and what date shall be fixed, and "in case any such stockholder shall fail or neglect to pay such assessment within the time fixed in said notice, the superintendent shall have a cause of action, in his own name as superintendent of banks, against such stockholder either severally or jointly [fol. 27] with other stockholders of such corporation, for the amount of such unpaid assessment or assessments, together with interest thereon from the date when such assessment was, by the terms of said notice, due and payable. In any such action, the written statement of the superintendent, under his hand and seal of office, reciting his determination to enforce the individual liability, or any part thereof, of such stockholders, and setting forth the value of the assets of such corporation and the liabilities thereof, as determined by him after examination and investigation, shall be presumptive evidence of such facts as therein stated."

The complaint further states that plaintiff decided that an assessment of $25 a share was required and necessary; and that on or about July 1st, 1932, he made demand on the various stockholders for the payment of $25 for each share of stock appearing upon the ledger to be held by such stockholder. Said demand stated that total amount assessed by plaintiff against all of the stockholders, the equal and pro rata share assessed against each stockholder for each share of stock held by him, and the total amount of the assessment for all shares held by each stockholder.

It then quotes Section 120 of the banking law which, so far as relevant, is to the effect that the individual liability of stockholders is to be governed exclusively by Sections 120 and 80, and that the stockholders shall be individually responsible to the extent of their stock at par in addition to the amount invested by them, and that an action to enforce such liability must be brought within six years after the cause of action has accrued. The section then undertakes to define and describe who the stockholders are (we need not consider that now) and then provides as follows:

[fol. 28] "In case the Superintendent of Banks shall have taken possession of the property and business of the bank pursuant to section fifty-seven of this chapter or a permanent receiver of such bank shall have been appointed, all actions or proceedings to enforce the liability of stockholders under this section shall be taken and prosecuted only in the name of the superintendent of the receiver, as the case may be, unless the superintendent or receiver shall refuse to take such action or proceeding upon proper request in writing made by any creditor, or shall have failed or neglected to commence such action or proceeding within sixty days after the receipt of such request, and in that event such action or proceeding may be taken by any creditor of the bank. But no such action shall be brought by a creditor until a judgment shall have been recovered by him against the bank and an execution thereon shall have been returned unsatisfied in whole or in part."

The final averment in the complaint is that each of the defendants named in Schedule 2 annexed to the complaint appearing as stockholders on the books of the bank to the number of shares set opposite his name, has neglected and failed to pay the assessment so imposed.

The briefs submitted in this matter are very voluminous and have come from a number of different counsel, but I think they do not make any substantial points beyond those that have been mentioned above. The case is one of great importance, and I should like to devote much more time to it than is practicable in view of the pressure of other work; but, so far as I can see, the decision of these points seems reasonably plain.

[fol. 29] It is to be observed that the present action is not one for the collection of unpaid subscriptions to stock,

but for the collection of an assessment up to the original par value of the stock. Consequently it differs from the recent case of Graham v. Fleissner, 107 N. J. Law, 278 in which Section 94 b was considered and held inapplicable to a case in which the defendant stockholder had secured his stock as an original issue at some fraction of its par value and was held liable for the difference. It was objected in that case that Section 94 b was applicable, but the Court of Errors and Appeals expressly held (p. 280) that the phrase "statutory personal liability" in the statute "means personal liability imposed by statute extra the common law liability to make up a deficit of par value, i. e., the so-called 'trust fund' theory of capital stock," and the Court held that even in the case of "trust fund" liability our courts would not cast up the assets and liabilities of a foreign corporation, but that that must be done at the domicile of said corporation or, as in the particular case, in bankruptcy.

As has been said, the present case is fundamentally different in that the attempt is to enforce by a suit at law against each individual stockholder a statutory personal liability of one hundred per cent of his claim after an ascertainment of assets, not by any court of law or equity, but by a State official not endowed with any judicial power so far as appears. That official comes over into this State and endeavors by a suit at law (or rather several hundred suits at law) to recover the several amounts that he has himself assessed against the shareholders respectively. This seems to me to fly directly in the face of our statute. As Banking Commissioner who has taken possession and is administer-[fol. 30] ing the affairs of the defunct corporation as a quasi receiver, the plaintiff is avowedly acting in the interest of the creditors and for no other purpose. He is attempting to recover from the stockholders severally, in several hundred separate suits combined merely for convenience, the amount of their statutory liability up to the statutory limit, for the purpose of paying those creditors. Whether it is one creditor or two or three or a dozen or several thousand appears to me to make no difference in the situation. This suit is not one suit, but a multiple suit, at law, clearly on behalf of creditors of a corporation, and that a foreign one, to enforce in each case a stautory personal liability of a stockholder. This exactly what the statute forbids.

Secondly, that to refuse to entertain this action would be to impair the obligation of a contract.

What I understand to be the contract claimed to exist in this case is the contract between the State of New York and its own corporation and between that corporation and its stockholders which, of course, is dependent upon the New York statute. It seems to be a sufficient answer to say, as has already been said, that our statute was in force long before the Bank of the United States was organized and so far as relates to any rights attempted to be conferred by the New York statute in permitting recovery in other States, this State is in on way bound thereby and perhaps would not be bound even although the incorporation of this bank antedated our statute. However, it is unnecessary to go so far as this. I think the point regarding impairment of contract is without substance.

Finally, that to deny the right of this Commissioner to sue at law in this State, as he is suing, is in defiance of the full faith and credit clause of the constitution.

[fol. 31] Here again I think the point is without substance. It is true that it has been held in one or more cases in the Supreme Court of the United States, as for example in Converse v. Hamilton, 224 U. S. 243, that where an assessment of this kind has been definitely adjudicated by the courts of the home State and turned in effect into a judgment against the various parties concerned, that adjudication is enforcible in a sister State by virtue of the federal constitution although the laws of the latter state may be to the contrary. But here we have no court adjudication of any kind. The Commissioner, pursuant to a statute, has taken charge and has determined as a Commissioner that the United States Bank is insolvent and that the stockholders ought to be assessed to make up the deficit. That no doubt he can enforce in New York State under the statute of that State. But when he comes over here he is met by the express prohibition of our statute against any suit at law and by the requirement that the suit shall be in the nature of an equitable accounting, to which all stockholders shall be parties. In the proceeding before me the suits are several, and only one defendant is a party in each, in theory of law.

As a matter of comity it is well known that State courts often lend their aid to the enforcement of rights which arise in other States; and in many cases they are bound to do so. But in a matter of this kind it was expressly laid down

by the Supreme Court of the United States in Finney v. Guy, 189 U. S. 335, that "whether a state court should permit an action to be maintained therein on the principle of comity between the states is a question exclusively for the courts of that state to decide," to which it may here be added that the legislature in the present instance under-[fol. 32] took to decide that question itself.

My conclusion is that the present complaint cannot be supported and must be struck out as stating causes of action which by statute are not maintainable at law in this State. Whether a judgment for the defendant should be directed thereon is a matter on which counsel are probably entitled to be heard.

As I view the matter now, it would seem that there should be a judgment for the moving defendants subject of course to appeal, and without prejudice to the filing of a bill in equity on the lines laid down in section 94-b of the Corporation Act. The matter might be transferred to the Court of Chancery, but the complaint would have to be reframed, I think in any event.

I will hear counsel on the first convenient motion day as to settlement of these details.

[fol. 33] In Supreme Court of New Jersey, Essex County

[Title omitted]

Order Striking Out Complaint

Application having been made by the defendants hereinafter named on due notice to plaintiff for an order striking out plaintiff's complaint herein on the grounds, among others, that the laws of this state prohibit the maintenance of this action in this court and that the complaint does not set forth any cause of action which is cognizable in a court of law of this state, and counsel for the respective parties having presented oral argument and filed briefs, and this court having considered same, and good and sufficient reason appearing therefor, and it appearing that all of the above mentioned attorneys for the above said defendants have consented to the form of this order; it is, on this tenth day of February, A. D. 1934, on motion of Bilder, Bilder & Kaufman, attorneys of defendants Mary Rosner, Essie R. Stone, Camilla Lowy, Ralph Waldron, J. Paul Neuwirth,

Richard E. Kohn, George Bierman, Samuel Berger, William J. Wells, M. James Fine, and Kate Harris; and Otto Cooper, attorney of defendant Morris Hermann; and Abe J. David, attorney of defendant Howard C. Sylvester; and [fol. 34] James Mercer Davis, attorney of defendants James Mercer Davis, Hamilton G. Pedrick and Clair MacFarland; and Eichmann & Seiden, attorneys for defendants Benjamin Gorlin, Charles Kanter, Henry J. Goodman, Benjamin Levy, Northern New Jersey Investment Co., a corp., Alex Steinberger, A. D. MacDougall and Gertrude Kapralik, and Howard Ewart, attorney of defendants Raymond C. Staples, William J. Gruler, Mrs. Maudé A. Benkart, Zulena Cook Woodward, Hannah C. Bailey, Charles N. Warner, Alfred R. M. Diggles, Charles P. Anderson, Andrew Schwarz, Frank W. Sutton, Jr., Toms River Amusement Co., Arney-Sutton-Gruler Co., Sutton Brothers Co., Stephen R. Applegate, Paul S. Goble, Howard Ewart, Mrs. Mary A. Van Nostrand; and Gross & Gross, attorneys for defendant Emanuel Gross; and Norman W. Harker, attorney for defendants Frederick D. Fahrenbruck and Katherine L. Fahrenbruck; and Harrison & Roche, attorneys for defendant The Bobdan Co.; and Sylvan Heilbrun, attorney for defendant Benjamin Heilbrun; and Lichtenstein, Schwartz & Friedenberg, attorneys for defendants The Farg Co. Inc., and Herman Geismar; and Aloysius McMahon, attorney for defendants Harry F. O'Mealia, Harry E. O'Mealia, O'Mealia Outdoor Advertising Co. and Omaco Securities Company; and Perkins, Drewen and Nugent, attorneys for defendants Nicholas W. D'Elia, Eric Korman and John Drewen; and Scammel, Knight & Reese, attorneys for defendant Arthur R. Brick; and Ben S. Shipman, attorney for defendant The Mart Inc.; Aquila N. Venino, attorney for Herbert Cooper, and Whittemore & McLean, attorneys for defendants George J. Alles and George W. Bauer,

[fol. 35] Ordered, that plaintiff's complaint be and the same hereby is struck out as to the above named defendants, and it appearing that no application is made by plaintiff to amend said complaint, it is further

Ordered, that judgment final be entered in favor of each of said defendants and against said plaintiff, with costs to be taxed under the direction of this Court.

Let this rule be entered.

Charles W. Parker, Supreme Court Justice.

[fol. 36] In Supreme Court of New Jersey

Action at Law

Joseph A. Broderick, as Superintendent of Banks of the State of New York, Plaintiff,

vs.

Benjamin Abrams, et als., Defendants

Judgment Final for Defendants on striking out Complaint.

Bilder, Bilder & Kaufman, attys. for defts. Mary Rosner, Essie R. Stone, Camilla Lowy, Ralph Waldron, J. Paul Neuwirth, Richard E. Kohn, George Bierman, Samuel Berger, William J. Wells, M. James Fine & Kate Harris.

Otto Cooper, Atty. for deft. Morris Hermann.

Abe J. David, Atty. for deft. Howard C. Sylvester.

James Mercer Davis, Atty. for defts. James Mercer Davis, Hamilton G. Pedrick and Clair MacFarland.

Eichmann & Seiden, Attys. for defts. Benjamin Gorlin, Charles Kanter, Henry J. Goodman, Benjamin Levy, Northern New Jersey Investment Co., a corp., Alex Steinberger, A. D. MacDougall and Gertrude Kapralik.

[fol. 37] Howard Ewart, Atty. of defts. Raymond C. Stables, William J. Gruler, Mrs. Maude A. Benkart (or Benkert), Zulena Cook Woodward, Hannah C. Bailey, Charles N. Warner, Alfred R. M. Diggles, Charles P. Anderson, Andrew Schwarz, Frank W. Sutton, Jr., Toms River Amusement Co., Arney-Sutton-Gruler Co., Sutton Brothers Co., Stephen R. Applegate, Paul S. Goble, Howard Ewart, Mrs. Mary A. Van Nostrand.

Gross & Gross, Attys. for deft. Emanuel Gross.

Norman W. Harker, Atty. for defts. Frederick D. Fahrenbruck & Katherine L. Fahrenbruck.

Harrison & Roche, Attys. for deft. The Bobdan Co.

Sylvan Heilbrun, Atty. for deft. Benjamin Heilbrun.

Lichtenstein, Schwartz & Friedenberg, Attys. for defts. The Farg Co., Inc. & Herman Geismar.

Aloysius McMahon, Atty. for defts. Harry F. O'Mealia, Harry E. O'Mealia, O'Mealia Outdoor Advertising Co. & Omaco Securities Company.

Perkins, Drewen & Nugent, Attys. for defts. Nicholas W. D'Elia, Eric Korman and John Drewen.

[fol. 38] Scammell, Knight & Reese, Attys. for deft. Arthur R. Brick.

Ben S. Shipman, Atty. for deft. The Mart, Inc.

Aquila N. Venino, Atty. for deft. Herbert Cooper.

Whittemore & McLean, Attys. for defts. George J. Alles and George W. Bauer.

JUDGMENT

Judgment entered this fourteenth day of February, A. D. nineteen hundred and thirty-four against the plaintiff and in favor of defendants Mary Rosner, Essie R. Stone, Camilla Lowy, Ralph Waldron, J. Paul Neuwirth, Richard E. Kohn, George Bierman, Samuel Berger, William J. Wells, M. James Fine, Kate Harris, Morris Hermann, Howard C. Sylvester, James Mercer Davis, Hamilton G. Pedrick, Clair MacFarland, Benjamin Gorlin, Charles Kanter, Henry J. Goodman, Benjamin Levy, Northern New Jersey Investment Co., a corp., Alex Steinberger, A. D. MacDougall, Gertrude Kapralik, Raymond C. Staples, William J. Gruler, Mrs. Maude A. Benkart (or Benkert) Zulena Cook Woodward, Hannah C. Bailey, Charles N. Warner, Alfred R. M. Diggles, Charles P. Anderson, Andrew Schwarz, Frank W. Sutton, Jr., Toms River Amusement Co., Arney-Sutton-Gruler Co., Sutton Brothers Co., Stephen R. Applegate, Paul S. Globe, Howard Ewart, Mrs. Mary A. Van Nostrand, Emanuel Gross, Frederick D. Fahrenbruck, Katherine L. Fahrenbruck, The Bobdan Co., Benjamin Heilbrun, The Farg Co., Inc., Herman Geismar, Harry F. O'Mealia, Harry E. O'Mealia, O'Mealia Out-

[fol. 39] door Advertising Co., Omaco Securities Company, Nicholas W. D'Elia, Eric Korman, John Drewen, Arthur R. Bricks, The Mart, Inc., Herbert Cooper, George J. Alles and George W. Bauer for the sum of —— costs.

Thomas J. Brogan, Chief Justice.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 40] In Supreme Court of New Jersey, Essex County

[Title omitted]

Notice of Appeal and Grounds of Appeal—Filed March 31, 1934

To: Messrs. Bilder, Bilder & Kaufman, attorneys for defendants Mary Rosner, Esssie R. Stone, Camilla Lowy, Ralph Waldron, J. Paul Neuwirth, Richard E. Kohn, George Bierman, Samuel Berger, William J. Wells, M. James Fine, and Kate Harris;

Otto Cooper, Esquire, attorney for defendant Morris Herman;

Abe J. David, Esquire, attorney for defendant Howard C. Sylvester;

James Mercer Davis, Esquire, attorney for defendants James Mercer Davis, Hamilton G. Pedrick, and Clair MacFarland;

Messrs. Eiclmann & Seiden, attorneys for defendants Benjamin Gorlin, Charles Kanter, Henry J. Goodman, Benjamin Levy, Northern New Jersey Investment Co., Alex Steinberger, A. D. MacDougall, and Gertrude Kapralik;

[fol. 41] Howard Ewart, Esquire, attorney for defendants Raymond C. Staples, William J. Gruler, Mrs. Maude A. Benkart, Zulena Cook Woodward, Hannah C. Bailey, Charles N. Warner Alfred R. M. Diggles, Charles P. Anderson, Andrew Schwarz, Frank W. Sutton, Jr., Toms River Amusement Co., Arney-Sutton-Gruler Co., Sutton Brothers Co., Stephen R. Applegate, Paul S. Goble, Howard Ewart, Mrs. Mary A. Van Nostrand;

Messrs. Gross & Gross, attorneys for defendant Emanuel Gross;

Norman W. Harker, Esquire, attorney for defendants Frederick D. Fahrenbruck, and Katherine L. Fahrenbruck;

Messrs. Harrison & Roche, attorneys for defendant The Bobdan Co.;

Sylvan Heilbrun, Esquire, attorney for defendant Benjamin Heilbrun;

Messrs. Lichtenstein, Schwartz & Friedenberg, attorneys for defendants The Farg Co., Inc., and Herman Geismar;

Aloysius McMahon, Esquire, attorney for defendants Harry F. O'Mealia, Harry E. O'Mealia, O'Melia Outdoor Advertising Co. and Omaco Securities Company;

Messrs. Perkins, Drewen and Nugent, attorneys for defendants Nicholas W. D'Elia, Eric Korman and John Drewen;

[fol. 42] Messrs. Scammell, Knight & Reese, attorneys for defendant Arthur R. Brick; Ben S. Shipman, Esquire, attorney for defendant The Mart, Inc.;

Aquila N. Venino, Esquire, attorney for defendant Herbert Cooper;

Messrs. Whittemore & McLean, attorneys for defendants George J. Alles and George W. Bauer.

Sirs:

Take notice that the plaintiff hereby appeals to the New Jersey Court of Errors and Appeals from the whole and every part of the order made in the above entitled action dated February 10, 1934, striking out plaintiff's complaint as to the defendants Mary Rosner, Essie R. Stone, Camilla Lowy, Ralph Waldron, J. Paul Neuwirth, Richard E. Kohn, George Bierman, Samuel Berger, William J. Wells, M. James Fine, Kate Harris, Morris Herman, Howard C. Sylvester, James Mercer Davis, Hamilton G. Pedrick, Clair MacFarland, Benjamin Gorlin, Charles Kanter, Henry J. Goodman, Benjamin Levy, Northern New Jersey Investment Co., Alex Steinberger, A. D. MacDougall, Gertrude Kapralik, Raymond C. Staples, William J. Gruler, Mrs. Maude A. Benkart (or Benkert), Zulena Cook Woodward, Hannah C. Bailey, Charles N. Warner, Alfred R. M. Diggles, Charles P. Anderson, Andrew Schwarz, Frank W. Sutton, Jr., Toms River Amusement Co., Arney-Sutton-Gruler Co., Sutton Brothers Co., Stephen R. Applegate, Paul S. Goble, Howard Ewart, Mrs. [fol. 43] Mary A. Van Nostrand, Emanuel Gross, Frederick D. Fahrenbruck, Katherine L. Fahrenbruck, The Bobdan Co., Benjamin Heilbrun, The Farg Co., Inc., Herman Geismar, Harry F. O'Mealia, Harry E. O'Mealia, O'Mealia Outdoor Advertising Co., Omaco Securities Company, Nicholas W. D'Elia, Eric Korman, John Drewen, Arthur R. Brick, The Mart, Inc., Herbert Cooper, George J. Alles and George W. Bauer, as well as from the whole and every part of the final judgments entered thereon in the above entitled action on the 8th day of March, 1934, in favor of each of the several defendants last aforesaid.

The following are plaintiff's grounds of appeal:

1. Said order and judgments are based upon an erroneous finding by the Court that the laws of this State prohibit the maintenance in this Court of the action set forth in the complaint.

2. Said order and judgments are based upon the erroneous finding that the complaint does not set forth any cause of action which is cognizable in a court of law of this State.

3. Said order and judgments are based upon an erroneous finding by the Court that the action set forth in the complaint is an action brought by or on behalf of a creditor of a foreign corporation against a stockholder thereof, to enforce a statutory personal liability of such stockholder for or upon a debt, default or obligation of such corporation arising from the statutes or laws of another State of the United States, within the intent and meaning of Section 94-B of the Corporation Act of the State of New Jersey.

[fol. 44] 4. Said order and judgments do not give full faith and credit to the public acts, records and judicial proceedings of the State of New York within the intent and meaning of Article IV, Section 1, of the Constitution of the United States, in that the complaint in above action sets forth as the basis of relief a public act and a judicial proceeding of the State of New York within the intent and meaning of the Constitution of the United States. Said statute of the State of New Jersey, if construed as prohibitive of said action, is void under the Constitution of the United States.

5. Said order and judgments, in effect, deny a remedy in the courts of this State upon a valid contract entered into within the jurisdiction and pursuant to the laws of a sister State, and thereby abridge the privileges and immunities of citizens of the United States and deny to the plaintiff the equal protection of the laws in violation of the Constitution of the United States and particularly the Fourteenth Amendment thereof.

6. Said statute of the State of New Jersey, as construed and applied by said order and judgments, is in violation of the Constitution of the United States and particularly the

Fourteenth Amendment thereof, and therefore null and void.

7. Said statute, as construed and applied by said order and judgments, in that it closes the courts of this State to plaintiff in enforcement of lawful contract rights except under impossible conditions, deprives plaintiff of its property in said contracts without due process of law, in [fol. 45] violation of the Constitution of the United States and particularly Article V and the Fourteenth Amendment thereof. Said statute is void and said order and judgments based thereon erroneous.

8. The complaint sets forth a cause of action depending upon defendants' contracts as stockholders of The Bank of United States, to pay assessments as and when determined pursuant to the laws of the State of New York, and such contractual obligations are not within the prohibition of said statute of New Jersey relied on by the Court in making said order and judgments.

9. Said order and judgments, in that they deny to the plaintiff a remedy upon lawful causes of action accruing to him under the laws of a sister State, as representative of a corporation of said State, deny to the plaintiff and to said corporation the privileges and immunities of a citizen of the State of New York secured by Article IV, Section 2 of the Constitution of the United States, and said order and judgments are, therefore, erroneous.

10. Said order and judgments, in that they are general judgments against the plaintiff and in favor of the named defendants, and, therefore, a bar to any other action in any other court of this or any other State, are erroneous, since the statute relied upon does not purport to go further than a prohibition against an action at law in the courts of this State, and does not justify a judgment concluding the plaintiff upon the merits of the cause of action.

11. Said order and judgments in favor of the aforesaid defendants and against the plaintiff are erroneous in that [fol. 46] plaintiff's complaint sets forth a valid cause of action upon which plaintiff was entitled to judgment against said defendants or to a trial in support of the allegations thereof.

12. Said order and judgments are in various other respects erroneous, illegal and void.

McDermott, Enright & Carpenter, Attorneys for Plaintiff-Appellant.

[fols. 47 & 48] In Court of Errors and Appeals of New Jersey, May Term, 1934

No. 122

Joseph A. Broderick, as Superintendent of Banks of the State of New York, Appellant,

vs.

Benjamin Abrams et als., Respondents

Appeal from Supreme Court.

Opinion—Filed Sept. 27, 1934

Per Curiam:

The judgment under review herein should be affirmed for the reasons expressed in the opinion delivered by Mr. Justice Parker in the Supreme Court, reported in 112 N. J. L. 309.

[File endorsement omitted.]

[fols. 49 & 50] In Court of Errors and Appeals of New Jersey

Joseph A. Broderick, Superintendent of Banks of New York, Plaintiff-Appellant,

vs.

Benjamin Abrams et als., Defendants, Appellees

On appeal from the Supreme Court.

Order of Affirmance and Remittitur—Filed Oct. 4, 1934

This cause having been duly argued at the May Term, 1934, of this Court by McDermott, Enright and Carpenter,

of Counsel with Appellant, and by Howard Ewart, of Counsel with the Appellees Raymond C. Staples, William J. Gruler, Mrs. Maude A. Benkart, Zulena Cook Woodward, Hannah C. Bailey, Charles N. Warner, Alfred R. M. Diggles, Charles P. Anderson, Andrew Schwarz, Frank W. Sutton, Jr., Toms River Amusement Co., Arney-Sutton-Gruler Co., Sutton Brothers Co., Stephen R. Applegate, Paul S. Goble, Mrs. Mary A. Van Nostrand, Howard Ewart, Hamilton G. Pedrick, Clair MacFarland, and James Mercer Davis, and the Court having considered the same and finding no error in the record or proceedings in the Supreme Court;

It is thereupon, on this 27th day of September, in the year of our Lord, One Thousand Nine Hundred and Thirty-four, Ordered and Adjudged that the judgment of the Supreme Court, removed by the appeal in this cause, be affirmed as to the Defendants named in the body of this Order, with costs; and that the record be remitted to the Supreme Court, to be proceeded with in accordance with this judgment and the practice of said Court. On Motion Of:

Howard Ewart, Attorney for Appellees Above-named.

[File endorsement omitted.]

[fols. 51 & 52] In Court of Errors and Appeals of New Jersey, May Term, 1934

Between Joseph A. Broderick, as Superintendent of Banks of the State of New York, Plaintiff-Appellant,

and

Benjamin Abrams et als., Defendants-Appellees

On appeal from Supreme Court.

Order of Affirmance of Judgment—Filed Oct. 10, 1934

This cause having been duly argued at the May term, 1934 of this court by James D. Carpenter, Jr. of counsel for the appellant and Walter J. Bilder of counsel for the respondents Mary Rosner, Essie R. Stone, Camilla Lowy,

Ralph Waldron, J. Paul Neuwirth, Richard E. Kohn, George Bierman, Samuel Berger, William J. Wells, M. James Fine and Kate Harris, and the Court having considered the same, and finding no error in the record or proceedings in the Supreme Court,

It is thereupon, on this 27th day of September, in the year of our Lord one thousand nine hundred and thirty-four Ordered and Adjudged that the judgment of the Supreme Court, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

Bilder, Bilder & Kaufman, Attorneys for Respondents, Mary Rosner, Essie R. Stone, Camilla Lowy, Ralph Waldron, J. Paul Neuwirth, Richard E. Kohn, George Bierman, Samuel Berger, William J. Wells, M. James Fine and Kate Harris.

A true copy: Thomas A. Mathis, Clerk.

[File endorsement omitted.]

[fols. 53 & 54] In Court of Errors and Appeals of New Jersey

[Title omitted]

Petition for Allowance of Appeal from the New Jersey Court of Errors and Appeals to the Supreme Court of the United States—Filed Oct. 22, 1934

To Honorable Luther A. Campbell, Chancellor and Presiding Judge of the New Jersey Court of Errors and Appeals:

The above named plaintiff-appellant, Joseph A. Broderick, Superintendent of Banks of the State of New York, feeling himself aggrieved by the judgment and order of the New Jersey Court of Errors and Appeals entered on the fourth day of October, Nineteen Hundred and Thirty-Four, in the above entitled cause, affirming the order of the New Jersey Supreme Court dated February 10, 1934, striking out plaintiff's complaint, and the judgment of said

New Jersey Supreme Court entered thereon in favor of the defendants and against the plaintiff February 14, 1934, hereby prays your Honor to allow an appeal from said judgment of the New Jersey Court of Errors and Appeals, being the Court of Last Resort in the State of New Jersey, to the Supreme Court of the United States, and that a transcript of the record and proceedings and papers on which said judgment was made and entered, duly authenticated, may be ordered to be sent to the said Supreme Court of the United States.

Dated: Jersey City, N. J., October 19, 1934.

James D. Carpenter, Jr., Attorney for Plaintiff-Appellant.

[File endorsement omitted.]

[fols. 55-68] In Court of Errors and Appeals of New Jersey

[Title omitted]

Order Allowing Appeal to Supreme Court of the United States—Filed Oct. 22, 1934

The above named plaintiff-appellant having petitioned the undersigned presiding Judge of the New Jersey Court of Errors and Appeals for an order allowing the plaintiff-appellant to appeal to the Supreme Court of the United States from the judgment of the New Jersey Court of Errors and Appeals, the Court of Last Resort of the State of New Jersey, dated October 4, 1934, and a bond, assignment of errors, citation, and statement of jurisdiction having been presented:

It is ordered that said appeal be and the same is hereby allowed, and appellant's bond in the sum of $3,000.00, with United States Fidelity & Guaranty Company, surety thereon, is hereby approved as to form and sufficiency. Dated: October 22, 1934.

Luther A. Campbell, Chancellor and Presiding Judge of the New Jersey Court of Errors and Appeals.

[File endorsement omitted.]

[fol. 69] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Oct. 22, 1934

Now comes the above named plaintiff-appellant by James D. Carpenter, Jr., his counsel, and says that in the record and proceedings in the above entitled cause there is manifest error in this, to wit:

(1) Because said judgment is based upon a finding that Chapter 50, P. L. 1897, page 124, Section 2, of the State of New Jersey, entitled "A Supplement to an act entitled 'An act concerning corporations' (Revision, 1896)," is a bar to the maintenance of this action in the courts of law of the State of New Jersey, whereas said statute is null and void in that it is repugnant to Article IV, Section 1, of the Constitution of the United States, providing:

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

(2) Because said judgment is based upon a finding that Chapter 50 of the Laws of 1897, page 124, Section 2, of the State of New Jersey, entitled "A Supplement to an act entitled 'An act concerning corporations' (Revision, 1896)," is a bar to the maintenance of this action in the courts of law of the State of New Jersey, whereas said [fol. 70] statute is null and void in that it is repugnant to Article IV, Section 2, Paragraph 1, of the Constitution of the United States, and the Fourteenth Amendment, which provides:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

(3) An act of the Legislature of the State of New Jersey entitled, "A Supplement to an act entitled 'An act concerning corporations' (Revision, 1896)," as construed and applied by the New Jersey Supreme Court and Court of Errors and Appeals, closes the courts of New Jersey to plaintiff in enforcement of lawful contract rights as stated in the complaint, except under conditions so burdensome as to be impossible, and so expensive as to deprive plaintiff of his property in said contracts without due process of

law, in violation of the Fourteenth Amendment of the Constitution of the United States. Said statute is void and the judgment based thereon is erroneous.

(4) An act of the Legislature of the State of New Jersey entitled, "A Supplement to an act entitled 'An act concerning corporations' (Revision, 1896)," as construed and applied by the New Jersey Supreme Court and Court of Errors and Appeals, closes the courts of New Jersey to plaintiff in the enforcement of lawful contract rights as stated in the complaint and as provided by Article VIII, Section 7 of the Constitution of the State of New York, and Sections 120 and 80 of the New York Banking Law, in violation of Article IV, Section 1 of the Constitution of the United States.

(5) An act of the Legislature of the State of New Jersey entitled, "A Supplement to an act entitled 'An act concerning corporations' (Revision, 1896)," as construed and applied by the New Jersey Supreme Court and Court of [fol. 71] Errors and Appeals, closes the courts of New Jersey to plaintiff in the enforcement of lawful contract rights as stated in the complaint and as provided by Article VIII, Section 7 of the Constitution of the State of New York, and Sections 120 and 80 of the New York Banking Law, except under conditions so burdensome as to be impossible and so expensive as to deprive the aforementioned constitutional and statutory provisions of the State of New York of full faith and credit as required by Article IV, Section 1 of the Constitution of the United States.

(6) The judgment of the New Jersey Court of Errors and Appeals is null and void in that it is a general judgment against the plaintiff and in favor of the named defendants, and therefore a bar to any other action in any other court of New Jersey, or any other State, and is erroneous since the statute of New Jersey above expressly referred to does not purport to go further than a prohibition against an action at law in the courts of New Jersey, and does not justify a judgment concluding the appellant upon the merits of the cause of action.

(7) The judgment of the New Jersey Court of Errors and Appeals is erroneous in that it did not give full faith and credit to the public acts, record and judicial proceedings of the State of New York, within the intent and mean-

ing of Article IV, Section 2, Paragraph 1, of the Constitution of the United States, in that the complaint in above entitled action sets forth as the basis of relief a public act and a judicial proceeding of the State of New York within the intent and meaning of the Constitution of the United States. Said statute of the State of New Jersey, being construed as prohibitive of said action, is void as repugnant to the section of the Constitution of the United States above [fol. 72] referred to.

(8) Said statute of the State of New Jersey as construed and applied by the order and judgment of the Supreme Court, and the judgment of the Court of Errors and Appeals, is in violation of the Constitution of the United States, and particularly the Fourteenth Amendment thereof, and is therefore null and void.

(9) Said statute of the State of New Jersey, which would deny to the appellant any relief in the cause of action stated in the complaint, other than in the nature of an equitable accounting for the proportionate benefit of all parties interested, to which The Bank of United States and its legal representatives, and all of its creditors (aggregating over four hundred thousand in number), and all of its stockholders (aggregating over twenty thousand), shall be necessary parties, is so unreasonable and so burdensome as to be impossible of performance, by reason whereof said statute deprives appellant of his property as Superintendent of Banks of the State of New York in assessments duly levied by him against stockholders of The Bank of United States resident in New Jersey, without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

Wherefore the said Joseph A. Broderick, as Superintendent of Banks of the State of New York, prays that the judgment of the New Jersey Court of Errors and Appeals may be in all things reversed.

James D. Carpenter, Jr., Counsel for Appellant.

[fols. 73-78] [File endorsement omitted]

[fol. 79] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 80] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Nov. 19, 1934

Now comes the above named appellant in the above entitled cause by James D. Carpenter, Jr., his counsel, and states that the points upon which he intends to rely in this Court in this cause, are as follows:

Point 1. That the New Jersey Court of Errors and Appeals erred in holding that an act of the legislature of the State of New Jersey known as Chapter 50 P. L. 1897, p. 124, Section 2, entitled "A Supplement to an act entitled 'An act concerning corporations' (Revision, 1896)", is a bar to the maintenance of this action, whereas said Statute is null and void in that it is repugnant to Article IV, Section 1, of the Constitution of the United States, which provides:

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

Point 2. Because the New Jersey Court of Errors and Appeals erred in holding that Chapter 50 P. L. 1897, p. 124, Section 2, of the State of New Jersey, entitled "A Supplement to an act entitled 'An act concerning corporations' (Revision, 1896)", is a bar to the maintenance of this action in the Courts of Law of the State of New Jersey, whereas said Statute is null and void in that it is repugnant to Article IV, Section 2, paragraph 1, of the Constitution of [fol. 81] the United States and the Fourteenth Amendment thereof, in that said Statute abridges the privileges and immunities of citizens of the United States.

Point 3. The act of the Legislature of the State of New Jersey, entitled "A Supplement to an act entitled 'An act concerning corporations' (Revision, 1896)," P. L. 1897, Chapter 50, p. 124, Section 2, as construed and applied by the New Jersey Supreme Court and New Jersey Court of Errors and Appeals, closes the courts of New Jersey to the plaintiff in enforcement of lawful contract rights, as stated in the complaint, except under conditions so burdensome as to be impossible, and so expensive as to deprive plaintiff of his property in said contracts without due process of

law, in violation of the Fourteenth Amendment of the Constitution of the United States. Said Statute is void and the judgment based thereon is erroneous.

Point 4. An act of the Legislature of the State of New Jersey entitled, "A Supplement to an act entitled 'An act concerning corporations' (Revision, 1896)," P. L. 1897, Chapter 50, p. 124, Section 2, as construed and applied by the New Jersey Supreme Court and Court of Errors and Appeals, closes the courts of New Jersey to plaintiff in the enforcement of lawful contract rights as stated in the complaint and as provided by Article VIII, Section 7, of the Constitution of the State of New York, and Sections 120 and 80 of the New York Banking Law, in violation of Article IV, Section 1 of the Constitution of the United States, which provides:

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

[fol. 82] Point 5. An act of the Legislature of the State of New Jersey entitled, "A Supplement to an act entitled 'An act concerning corporations' (Revision, 1896)," P. L. 1897, Chapter 50, p. 124, Section 2, as erroneously construed and applied by the New Jersey Supreme Court and Court of Errors and Appeals, closes the courts of New Jersey to plaintiff in the enforcement of lawful contract rights as stated in the complaint and as provided by Article VIII, Section 7 of the Constitution of the State of New York, and Sections 120 and 80 of the New York Banking Law, except under conditions so burdensome as to be impossible and so expensive as to deprive the aforementioned constitutional and statutory provisions of the State of New York of full faith and credit as required by Article IV, Section 1 of the Constitution of the United States.

Point 6. The judgment of the New Jersey Court of Errors and Appeals is null and void in that it is a general judgment against the plaintiff and in favor of the named defendants, and therefore a bar to any other action in any other court of New Jersey, or any other State, and is erroneous since the statute of New Jersey above expressly referred to does not purport to go further than a prohibition against an action at law in the courts of New Jersey,

and does not justify a judgment concluding the appellant upon the merits of the cause of action.

Point 7. The judgment of the New Jersey Court of Errors and Appeals is erroneous in that it did not give full faith and credit to the public acts, record and judicial proceedings of the State of New York, within the intent and meaning of Article IV, Section 2, Paragraph 1, of the Constitution of the United States, in that the complaint in [fol. 83] above entitled action sets forth as the basis of relief public acts and judicial proceedings of the State of New York within the intent and meaning of the Constitution of the United States. Said statute of the State of New Jersey, being construed as prohibitive of said action, is void as repugnant to the section of the Constitution of the United States above referred to.

Point 8. Said statute of the State of New Jersey as construed and applied by the order and judgment of the Supreme Court, and the judgment of the Court of Errors and Appeals, is in violation of the Constitution of the United States, and particularly the Fourteenth Amendment thereof, and is therefore null and void.

Point 9. Said statute of the State of New Jersey, which would deny to the appellant any relief in the cause of action stated in the complaint, other than in the nature of an equitable accounting for the proportionate benefit of all parties interested, to which The Bank of United States and its legal representatives, and all of its creditors (aggregating over four hundred thousand in number), and all of its stockholders (aggregating over twenty thousand), shall be necessary parties, is so unreasonable and so burdensome as to be impossible of performance, by reason whereof said statute, as construed by the New Jersey Court of Errors and Appeals, deprives appellant of his property as Superintendent of Banks of the State of New York in assessments duly levied by him against stockholders of The Bank of United States resident in New Jersey, without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

[fols. 84 & 85] And the appellant further states, that the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

1. All the papers, pleadings and judgment as printed in the State of Case in the above entitled cause before the New Jersey Court of Errors and Appeals.
2. The opinion of the New Jersey Court of Errors and Appeals.
3. The judgment of the New Jersey Court of Errors and Appeals.
4. Petition for appeal to the Supreme Court of the United States.
5. Order allowing appeal to the Supreme Court of the United States.
6. Statement of Jurisdiction.
7. Assignments of Error.

James D. Carpenter, Jr., Counsel for Appellant.

[fol. 86] [File endorsement omitted]

Endorsed on cover: File No. 39,156. New Jersey Court of Errors and Appeals. Term No. 528. Joseph A. Broderick, Superintendent of Banks of the State of New York, Appellant, vs. Mary Rosner, Essie R. Stone, Camilla Lowy et al. Filed November 15, 1934. File No. 528 O. T. 1934.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 528

JOSEPH A. BRODERICK, SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK,

Appellant,

vs.

MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, ET AL.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

STATEMENT AS TO JURISDICTION.

Joseph A. Broderick, Superintendent of Banks of the State of New York, does hereby state the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the New Jersey Court of Errors and Appeals, the highest court of the State of New Jersey:

(a) The statutory provision believed to sustain the jurisdiction is as follows:

United States Code Annotated, Title 28, Section 344, paragraph (a), which provides:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

(b) The statute of New Jersey, the validity of which is involved, is an Act of the Legislature of the State of New Jersey entitled, "A Supplement to an act entitled 'An act concerning corporations' (Revision, 1896), approved April twenty-first, one thousand eight hundred and ninety-six", being Chapter 50, page 124, P. L. 1897. The pertinent provisions read as follows:

> "2. No action or proceeding shall be maintained in any court of law of this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, if such statutory personal liability be created ~~by~~ or ~~arise from the statutes~~ or laws of any other state or foreign country, and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in a nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties.
>
> "3. This act shall take effect immediately.
>
> "Approved March 30, 1897."

(c) The date of the judgment sought to be reviewed is October 4th, 1934. The application for the allowance of an appeal was presented October 22, 1934.

(d) The nature of the case is as follows:

Plaintiff as Superintendent of Banks of the State of New York in accordance with the provisions of the laws of that State took possession of The Bank of United States, a State Banking Institution, and in accordance with the laws of New York in due course determined that the assets of the Bank were not sufficient to pay its liabilities, and in accordance with the provisions of the New York Banking Laws duly levied an assessment against the shareholders of the Bank equal to the par value of all shares held by them.

Under the New York Law, as construed by the New York Courts, this assessment is binding and conclusive upon all stockholders wherever resident.

Broderick, Superintendent, &c. v. *Adamson,* 148 Misc. (N. Y.) 353; 265 N. Y. Supp., 804;

Broderick, Superintendent, &c. v. *Aaron,* 147 Misc. (N. Y.) 854, 264 N. Y. Supp., 15.

The provisions of the New York Banking Law with relation to the determination to assess and levying and collecting assessments by the Superintendent of Banks, are very similar to the provisions of the banking laws of the United States.

Re Union Bank, 204 N. Y., 313;

Van Tuyl v. *Scharmann,* 208 N. Y., 53;

Report to Governor of the Commissioner on Banks, December 1907;

Report of Superintendent of Banks, N. Y., Senate Document No. 6, 131st Session, p. XXIX.

And the right of the Comptroller of the Currency to levy and collect assessments has repeatedly been upheld.

Kennedy v. *Gibson*, 8 Wall. 498;
Studebaker v. *Perry*, 184 U. S. 258;
McDonald v. *Thompson*, 184 U. S. 71;
United States v. *Knox*, 102 U. S. 422.

The action below was brought at law by the Superintendent of Banks against five hundred fifty-seven stockholders of said Bank resident in New Jersey to recover the assessment levied by the Superintendent of Banks in his official capacity against them, aggregating over $500,000. Plaintiff's complaint alleged, among other things, that the creditors of The Bank of United States aggregate over four hundred thousand (400,000), and are scattered throughout the United States and foreign countries, beyond the reach of process of the courts of New Jersey; that the stock of the said Bank is owned by twenty thousand, eight hundred forty-three (20,843) stockholders, residing in nearly every State of the United States, and also residing in Cuba, Greece, Switzerland, France, Monaco, Panama, Roumania, Jugo-Slavia and Italy; that the liabilities of the Bank were more than $30,000,000 in excess of assets. The capital of the Bank is divided into 1,010,000 shares of the par value of $25.00 per share, giving an aggregate capital of $25,250,000.

The defendants-appellees below moved to strike out plaintiff's complaint as

(1) Not setting forth a cause of action.

(2) Because the alleged liability set forth in the complaint is not enforceable in the Courts of New Jersey.

(3) That the laws of New Jersey prohibit the maintenance of this action in the Supreme Court of New Jersey.

Mr. Justice Parker, sitting as a single Justice, heard argument and held that the plaintiff

> "comes over into this State and endeavors by a suit at law (or rather several hundred suits at law) to recover the several amounts that he has himself assessed against the shareholders respectively. This seems to me to fly directly in the face of our statute" (referring to the statute above).

The court concluded with a statement:

> "it would seem that there should be a judgment for the moving defendants subject of course to appeal, and without prejudice to the filing of a bill in equity on the lines laid down in section 94-b of the Corporation Act" (the section bearing that designation in a pamphlet printed by the Secretary of State). "The matter might be transferred to the Court of Chancery, but the complaint would have to be reframed, I think in any event."

The court thereupon made an order that plaintiff's complaint be struck out as to the defendants named, and

> "Ordered, that judgment final be entered in favor of each of said defendants and against said plaintiff, with costs to be taxed under the direction of this Court."

Appellant took an appeal from the final judgment entered on said order of February 14, 1934, to the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey, alleging the following grounds of appeal, which specifically set forth the grounds here urged as showing the jurisdiction of this Court:

> "4. Said order and judgments do not give full faith and credit to the public acts, records and judicial proceedings of the State of New York within the intent and meaning of Article IV, Section 1, of the Constitu-

tion of the United States, in that the complaint in above action sets forth as the basis of relief a public act and a judicial proceeding of the State of New York within the intent and meaning of the Constitution of the United States. Said statute of the State of New Jersey, if construed as prohibitive of said action, is void under the Constitution of the United States.

"5. Said order and judgments, in effect, deny a remedy in the courts of this State upon a valid contract entered into within the jurisdiction and pursuant to the laws of a sister State, and thereby abridge the privileges and immunities of citizens of the United States and deny to the plaintiff the equal protection of the laws, in violation of the Constitution of the United States and particularly the Fourteenth Amendment thereof.

"6. Said statute of the State of New Jersey, as construed and applied by said order and judgments, is in violation of the Constitution of the United States and particularly the Fourteenth Amendment thereof, and therefore null and void.

"7. Said statute, as construed and applied by said order and judgments, in that it closes the courts of this State to plaintiff in enforcement of lawful contract rights except under impossible conditions, deprives plaintiff of its property in said contracts without due process of law, in violation of the Constitution of the United States and particularly Article V and the Fourteenth Amendment thereof. Said statute is void and said order and judgments based thereon erroneous.

"8. The complaint sets forth a cause of action depending upon defendants' contracts as stockholders of The Bank of United States, to pay assessments as and when determined pursuant to the laws of the State of New York, and such contractual obligations are not within the prohibition of said statute of New Jersey relied on by the Court in making said order and judgments.

"9. Said order and judgments, in that they deny to the plaintiff a remedy upon lawful causes of action accruing to him under the laws of a sister State, as representative of a corporation of said State, deny to the plaintiff and to said corporation the privileges and immunities of a citizen of the State of New York secured by Article IV, Section 2 of the Constitution of the United States, and said order and judgments are, therefore, erroneous."

The New Jersey Court of Errors and Appeals on September 28, 1934, filed a *per curiam* opinion affirming the judgment of the Supreme Court on the opinion of Mr. Justice Parker filed in the Supreme Court.

The cases believed to sustain the jurisdiction of this Court are as follows:

That appellant has the right to an appeal to this Court:
Nashville C. & St. L. Ry. v. *White*, 278 U. S., 456;
Great Northern Ry. Co. v. *Minnesota*, 278 U. S., 503.

The right of the plaintiff to sue at law and recover assessments levied by him against non-resident stockholders of The Bank of United States has been upheld:

In Pennsylvania:
Broderick, Superintendent, &c., v. *Stephano*, 171 Atl. Rep. 582;

In Connecticut:
Broderick, Superintendent, &c., v. *McGuire*, 174 Atl. Rep. 314 (October 6, 1934, Advance Sheets).

In the Circuit Court of Appeals (4th Cir.) (Maryland):
Broderick, Superintendent, &c., v. *American General Corp.*, 71 F. (2d) 864 (Advance Sheets, September 17, 1934).

New Jersey is the only State which has so far finally denied plaintiff the right to recover.

Plaintiff has brought or is required to bring such actions in approximately thirty States of the United States.

That plaintiff's action is at law and not in equity:

Broderick, Superintendent, &c., v. *American General Corporation*, 71 F. (2d) 864 (C. C. A. 4th Cir.).
Kennedy v. *Gibson*, 8 Wall. 498;
Studebaker v. *Perry*, 184 U. S. 258;
Hale v. *Allison*, 188 U. S. 56;
Shriver v. *Woodbine Bank*, 285 U. S. 467.

The liability of the stockholders is to be determined by the laws of New York, the domicile of the Bank, and where and under whose laws the assessment was made.

Converse v. *Hamilton*, 224 U. S. 243;
Selig v. *Hamilton*, 234 U. S. 652;
Bernheimer v. *Converse*, 206 U. S. 516;
Converse v. *Ætna National Bank*, 212 U. S. 567.

Plaintiff as Superintendent of Banks is the statutory successor of the corporation for the purpose of winding up its affairs.

Rolfe v. *Rundle*, 103 U. S. 322;
Clark v. *Williard*, 78 L. Ed. 743.

The assessment levied by plaintiff as Superintendent of Banks of New York under and according to the laws of New York, is entitled to full faith and credit in the several States.

Converse v. *Hamilton*, 224 U. S. 243;
Rolfe v. *Rundle*, 103 U. S. 322;
Marin v. *Augdeahl*, 247 U. S. 142;
Giles v. *Duke* (C. C. A. 9th Cir.), 5 F. (2d) 952;
Scoville v. *Thayer*, 105 U. S. 159;
Modern Woodmen of America v. *Mixer*, 267 U. S. 544.

The New Jersey statute as applied to this action by the New Jersey courts requires plaintiff to file a bill in equity

for an equitable accounting, which has already been made by plaintiff in his official capacity in New York in compliance with the New York statute. It also requires plaintiff to join as necessary parties over four hundred thousand creditors of The Bank of United States, the vast majority of whom reside in States other than New Jersey, and upon whom it is impossible to effect personal service, or for the courts of New Jersey to obtain jurisdiction over unless they voluntarily appear in the litigation. The statute also requires plaintiff to join as necessary parties to the litigation all of the stockholders of The Bank of United States at the date of its closing. The complaint alleges that there were some twenty thousand, eight hundred and forty-three stockholders of record. The number of equitable or beneficial owners of stock registered in the name of mere nominees and dummies is still uncertain. Of the twenty thousand, eight hundred and forty-three stockholders of record only some five hundred and fifty-seven reside in the State of New Jersey. Of those remaining more than eighteen thousand reside in New York, and fifteen hundred in some thirty States throughout the Union and foreign countries, including Canada, Cuba, Greece, Switzerland, France, Monaco, Panama, Roumania, Jugo-Slavia and Italy. It is, therefore, obvious that personal service of the summons and complaint cannot be effected upon such non-resident stockholders in the State of New Jersey, and the courts of New Jersey can obtain jurisdiction over such stockholders only if they should voluntarily appear. Since the statute requires that every stockholder and every creditor shall be a necessary party, notice would have to be given each of said non-resident parties by mailing and by publication. Assuming that there are twelve hundred words in a newspaper column, and that notice would have to be published to four hundred twenty thousand non-resident defendants,

each with a proper and surname, the notice to be published would fill at least eighty newspaper pages of eight columns each. The cost of such publication, four weeks successively, would probably aggregate more than the total recoverable from the New Jersey stockholders, if it did not cost more than the aggregate which they owe. Moreover, a very large number of the stockholders of the Bank have paid their assessments in full. Many thousand others have entered into agreements providing for the payment of their assessments in installments. The stockholders residing in New York have all been sued and judgments have gone against many of them.

Broderick, Superintendent, &c., v. *Adamson*, 148 Misc. (N. Y.) 353;

Broderick, Superintendent, &c., v. *Aaron*, 147 Misc. (N. Y.) 854.

Many stockholders residing in foreign States have already been sued and judgment has gone against many. See

Broderick, Superintendent, &c., v. *Stephano*, 171 Atl. Rep. 582 (Pa.);

Broderick, Superintendent, &c., v. *McGuire*, 174 Atl. Rep. 314 (Conn.);

Broderick, Superintendent, &c., v. *American General Corporation*, 71 F. (2d) 864 (Md.).

Similarly, with few exceptions, litigations are in progress in all other jurisdictions where the remaining stockholders reside. This brief résumé of the status of the enforcement of the assessment establishes clearly (1) that if the requirement in the New Jersey statute that all creditors and all stockholders of the Bank are necessary parties to any litigation in that State to enforce the assessment, then the statute in effect prevents and prohibits the insti-

tution of any litigation in that jurisdiction to recover the assessment in violation of the requirements of Article IV, Section 1 of the Constitution of the United States as interpreted by the Supreme Court in

Bernheimer v. *Converse*, 206 U. S. 516;
Converse v. *Hamilton*, 224 U. S. 243;
Royal Arcanum v. *Green*, 237 U. S. 531;
Modern Woodmen of America v. *Mixer*, 267 U. S. 544; and
Hancock National Bank v. *Farnum*, 176 U. S. 640,

as well as the requirements of the Fourteenth Amendment of the Constitution of the United States:

Home Insurance Co. v. *Dick*, 281 U. S. 397, 407-8;
Sioux City Bridge Co. v. *Dakota County*, 260 U. S. 441;
Hartford Accident &c. Co. v. *Delta & Pine Land Co.*, 78 L. Ed. 767;
Nebbia v. *New York*, 78 L. Ed. 563;

and (2) in any event the requirement that all such persons be necessary parties is obviously unreasonable, harsh and oppressive, and through its burdensome and oppressive provisions in effect prevents enforcement of the assessment against stockholders of The Bank of United States in the State of New Jersey.

Sioux City Bridge Co. v. *Dakota County*, 260 U. S., 441.

JAMES D. CARPENTER, JR.,
Counsel for Appellant.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 528

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York,
Appellant,

vs.

MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, *et al.*

Appeal from the Court of Errors and Appeals of the State of New Jersey.

BRIEF FOR APPELLANT.

JAMES D. CARPENTER, JR.,
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Of Counsel with Appellant Joseph A. Broderick, as Superintendent of Banks of the State of New York.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 528

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York, Appellant, *vs.* MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, *et als.*	Appeal from the Court of Errors and Appeals of the State of New Jersey.

BRIEF FOR APPELLANT.

Statement.

This is an appeal from a final judgment of the New Jersey Court of Errors and Appeals (Record, pp. 29-31) affirming a final judgment of the New Jersey Supreme Court dismissing the complaint of plaintiff in this action (*Id.*, pp. 23, 24). The opinion of Mr. Justice PARKER of the Supreme Court rendered upon the dismissal of the complaint is officially reported in 112 N. J. L., page 309, under the title, "Broderick *v.* Abrams." The New Jersey Court of Errors and Appeals affirmed the judgment of the Supreme Court upon the opinion of the Supreme Court justice. The opinion of the Court of Errors and Appeals

is not officially reported, but appears in the Record, page 29, under the title, "Broderick *v.* Abrams."

The Complaint.

It is alleged that plaintiff was, on and prior to December 11, 1930 and now is, the Superintendent of Banks of the State of New York (par. 1, Record, p. 3); that The Bank of United States is a moneyed corporation organized under the Banking Law of the State of New York, and maintained its office and principal place of business in the Borough of Manhattan (par. 2, R., p. 3); that on December 11, 1930, the capital of said bank amounted to $25,250,000, represented by 1,010,000 shares of the par value of $25 per share, all of which were and now are issued and outstanding, and held by some 20,843 stockholders residing in nearly every state of the United States and also residing in Cuba, Greece, Switzerland, France, Monaco, Panama, Roumania, Jugoslavia and Italy (par. 2, R., p. 3).

It is further alleged that on December 11, 1930, The Bank of United States could not with safety and expediency continue in business, and thereupon and on said day plaintiff took possession thereof pursuant to the provisions of Section 57 of the New York Banking Law,* and has since continued in possession and been engaged in its liquidation (par. 3, R., p. 3); and that prior to May 6, 1931, plaintiff determined to liquidate its affairs, and pursuant to the provisions of Section 72 of the New York Banking Law duly mailed and published notice to all of its creditors to present and make proper proof of their claims prior to June 29,

* Section 57 of the New York Banking Law, and all other statutes of New York involved upon this appeal are set forth in full in the appendix of statutes annexed to this brief.

1931 (par. 4, R., p. 4). The creditors of The Bank of United States, it is alleged, aggregate over 400,000 in number, and are scattered throughout the United States and foreign countries, and beyond the reach of process of the courts of New Jersey (par. 5, R., p. 5).

It is then alleged (par. 6, R., p. 5) that Article VIII, Section 7, of the Constitution of the State of New York provides as follows:

> "The stockholders of every corporation and joint-stock association for banking purposes, shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind."

and that Section 120 of the New York Banking Law provides in part (par. 10, R., p. 7):

> "The rights, powers and duties of stockholders of banks shall be as prescribed in the general corporation law and the stock corporation law; but the individual liability of such stockholders for the contracts, debts, and engagements of the bank and the time within which an action may be instituted to enforce such liability shall be governed exclusively by the provisions of this section and section eighty of this chapter.
>
> "The stockholders of every bank shall be individually responsible, equally and ratably and not one for another, for all contracts, debts and engagements of the bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. An action to enforce such liability must be brought within six years after the cause of action has accrued. The term 'stockholder' as used in this section shall apply to:

"1. Such persons as appear by the books of the bank to be stockholders;

"2. Every owner of stock, legal or equitable, although the same may be on such books in the name of another person, * * *

"In case the superintendent of banks shall have taken possession of the property and business of the bank pursuant to section fifty-seven of this chapter * * *, all actions or proceedings to enforce the liability of stockholders under this section shall be taken and prosecuted only in the name of the superintendent * * *".

The complaint also sets forth the following provisions of Section 80 of the New York Banking Law (par. 7, R., p. 5):

"Whenever a liability of stockholders for the amount of their respective shares of any such corporation exists, and the superintendent has duly taken possession of the property and business of such corporation, and has duly notified creditors to present and make proof of their respective claims and the last day to present such claims has expired, and he has determined from his examination of its affairs that the reasonable value of the assets of such corporation is not sufficient to pay its creditors in full, he may enforce the individual liability of such stockholders in whole or in part. In case he determines to enforce such liability, he shall make demand in writing upon such stockholders by causing such demand to be enclosed in sealed envelopes addressed and mailed, postage prepaid, to said respective stockholders at their last known places of address as the same appear upon the stock ledger of such corporation or at their last known address if no address appears in said ledger. Such demand shall state the total amount assessed by the superintendent against the stockholders and the equal and

pro rata share assessed against each stockholder for each share of stock, and the total amount of such assessment for all the shares of stock of such stockholder. Such demand shall also fix a date, not earlier than thirty days from the date of such notice, upon which such stockholder shall be required to pay such assessment to the superintendent. In case any such stockholder shall fail or neglect to pay such assessment within the time fixed in said notice, the superintendent shall have a cause of action, in his own name as superintendent of banks, against such stockholder either severally or jointly with other stockholders of such corporation, for the amount of such unpaid assessment or assessments, together with interest thereon from the date when such assessment was, by the terms of said notice, due and payable. In any such action, the written statement of the superintendent, under his hand and seal of office, reciting his determination to enforce the individual liability, or any part thereof, of such stockholders, and setting forth the value of the assets of such corporation and the liabilities thereof, as determined by him after examination and investigation, shall be presumptive evidence of such facts as therein stated."

The complaint then alleges that subsequent to the 29th day of June, 1931, and prior to July 1, 1932, plaintiff, after an examination of its assets, determined and ascertained that the reasonable value of the assets of The Bank of United States was not sufficient to pay its creditors in full, and that there was due and owing by such bank to its depositors and creditors, for moneys received and due and unpaid upon deposit accounts, and other moneys owing for value received upon its contracts, debts and engagements, a sum in excess of $30,000,000 over and above the reasonable value of such assets; that such insufficiency as so fixed

and ascertained then existed and has since continued (par. 5, R., p. 5); and that subsequent to such determination, and prior to July 1, 1932, plaintiff decided that an assessment of $25 against each stockholder for each share of stock held by him was necessary to provide moneys toward the payment and satisfaction of the sums due and owing the creditors of such bank (par. 8, R., p. 6).

The complaint then alleges that thereafter and on or about July 1, 1932, plaintiff made demand in writing, a sample copy of which is annexed to the complaint (R., p. 10), upon all the stockholders of The Bank of United States appearing upon its stock ledger, for the payment on August 8, 1932 of $25 for each share of stock appearing upon such stock ledger to be held by each stockholder, which demand stated the total amount assessed by plaintiff against all of the stockholders, the equal and *pro rata* share assessed against each stockholder for each share of stock held by him, and the total amount of the assessment for all of the shares held by each such stockholder (par. 9, R., p. 6).

The concluding paragraphs of the complaint allege that on and prior to December 11, 1930 each of the defendants appeared and now appears upon the stock ledger of The Bank of United States as the owner and holder of the number of shares set opposite his respective name upon the schedule annexed thereto (par. 11, R., p. 8), and has failed to pay the assessment levied against him (par. 12, R., p. 8), and judgment is demanded for such sum together with interest from August 8, 1932 (R., p. 10).

The allegations of the "SECOND COUNT" (R., p. 9) are identical with the allegations of the "FIRST COUNT," except that they refer to certain equitable owners, and need not, therefore, be repeated at length.

Proceedings Below.

Defendants moved to dismiss plaintiff's complaint on the grounds that: (1) the complaint did not set forth a cause of action, (2) the liability alleged therein is unenforceable in New Jersey, and (3) that the laws of New Jersey prohibit the maintenance of the action in the Supreme Court (R., pp. 12-14).

Mr. Justice PARKER, sitting as a single Supreme Court justice, heard argument upon the aforesaid motion, and in his opinion based his decision on an Act of the Legislature of the State of New Jersey entitled, "A supplement to an act entitled 'An act concerning corporations' (Revision, 1896), approved April twenty-first, one thousand eight hundred and ninety-six," being Chapter 50, page 124, P. L. 1897, and designated in a pamphlet printed by the Secretary of State of New Jersey, and hereafter referred to, as Section 94b of the Corporation Act of New Jersey, which provides as follows:

> "2. No action or proceeding shall be maintained in any court of law of this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country, and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in a nature of an equitable accounting for the proportionate

benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties.

"3. This act shall take effect immediately.
"Approved March 30, 1897."

The Court stated that the plaintiff:

"* * * comes over into this State and endeavors by a suit at law (or rather several hundred suits at law*) to recover the several amounts that he has himself assessed against the shareholders respectively. This seems to me to fly directly in the face of our statute" (referring to the statute above).

The Court concluded as follows:

"It would seem that there should be a judgment for the moving defendants subject of course to appeal, and without prejudice to the filing of a bill in equity on the lines laid down in section 94-b of the Corporation Act. The matter might be transferred to the Court of Chancery, but the complaint would have to be reframed, I think in any event" (Record, pp. 15-21).

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* This is a single action in which some 500 stockholders, representing all of the stockholders of record residing in New Jersey, are named as parties defendant. The liability of stockholders is, under Section 80 of the New York Banking Law, joint and several, and the cause of action arises out of a single assessment based upon an ascertained deficiency of one bank. There is, therefore, the essential community of interest to sustain the joinder, and since the cause of action against all of the defendants arises out of the same subject matter, this was obviously proper (P. L. of New Jersey, 1912, p. 378, §6 (1, 2)). The statement in the opinion that the action is several hundred suits at law is merely a statement of what the Supreme Court Justice considered to be the legal effect of the joinder.

The Court thereupon entered an order directing, not that the complaint be dismissed with leave to amend, or be transferred to equity, but that the complaint be struck out and that final judgment be entered in favor of each defendant. This order provides:

> "Ordered, that *judgment final* be entered in favor of each of said defendants and against said plaintiff, with costs to be taxed under the direction of this Court" (Record, pp. 21, 22).

Appellant appealed from the final judgment entered in the said Supreme Court on February 14, 1934 (R., pp. 23, 24) to the Court of Errors and Appeals of New Jersey, the court of last resort in that jurisdiction, upon specifications of error (R., pp. 25-29), similar to the following specifications of error urged upon the present appeal (R., pp. 33-39):

> (1) The judgment of the New Jersey Court of Errors and Appeals is erroneous because said judgment is based upon a finding that Chapter 50, P. L. 1897, page 124, Section 2, of the State of New Jersey, entitled "A Supplement to an act entitled 'An Act concerning corporations' (Revision, 1896)", is a bar to the maintenance of this action in the courts of law of the State of New Jersey, whereas said statute is null and void in that it is repugnant to Article IV, Section I, of the Constitution of the United States, providing:
>
> > "Full faith and Credit shall be given in each State to the Public Acts, Records and judicial Proceedings of every other State."
>
> (2) Because said judgment is based upon a finding that Chapter 50 of the Laws of 1897, page 124, Section 2, of the State of New Jersey, entitled "A Supplement to an Act entitled 'An act concerning corporations' (Revision, 1896)", is a bar to the maintenance of this

action in the courts of law of the State of New Jersey, whereas said statute is null and void in that it is repugnant to Article IV, Section 2, Paragraph 1, of the Constitution of the United States, and the Fourteenth Amendment, which provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several states."

(3) An Act of the Legislature of the State of New Jersey entitled, "A Supplement to an act entitled 'An act concerning corporations' (Revision, 1896)", as construed and applied by the New Jersey Supreme Court and Court of Errors and Appeals, closes the courts of New Jersey to plaintiff in enforcement of lawful contract rights as stated in the complaint, except under conditions so burdensome as to be impossible, and so expensive as to deprive plaintiff of his property in said contracts without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. Said statute is void and the judgment based thereon is erroneous.

(4) An Act of the Legislature of the State of New Jersey entitled, "A Supplement to an act entitled 'An Act concerning corporations' (Revision, 1896)," (P. L. 1897, Ch. 50) as construed and applied by the New Jersey Supreme Court and Court of Errors and Appeals, closes the courts of New Jersey to plaintiff in the enforcement of lawful contract rights as stated in the complaint and as provided by Article VIII, Section 7, of the Constitution of the State of New York, and Sections 120 and 80 of the New York Banking Law, in violation of Article IV, Section 1 of the Constitution of the United States.

(5) An Act of the Legislature of the State of New Jersey entitled, "A Supplement to an act entitled 'An

Act concerning corporations' (Revision, 1896)," (P. L. 1897, Ch. 50) as erroneously construed and applied by the New Jersey Supreme Court and Court of Errors and Appeals, closes the courts of New Jersey to plaintiff in the enforcement of lawful contract rights as stated in the complaint and as provided by Article VIII, Section 7, of the Constitution of the State of New York, and Sections 120 and 80 of the New York Banking Law, except under conditions so burdensome as to be impossible and so expensive as to deprive the aforementioned constitutional and statutory provisions of the State of New York of full faith and credit as required by Article IV, Section 1, of the Constitution of the United States.

(6) The judgment of the New Jersey Court of Errors and Appeals is null and void in that it is a general judgment against the plaintiff and in favor of the named defendants, and therefore a bar to any other action in any other court of New Jersey, or any other State, and is erroneous since the statute of New Jersey above expressly referred to does not purport to go further than a prohibition against an action at law in the courts of New Jersey, and does not justify a judgment concluding the appellant upon the merits of the cause of action.

(7) The judgment of the New Jersey Court of Errors and Appeals is erroneous in that it did not give full faith and credit to the public acts, records and judicial proceedings of the State of New York, within the intent and meaning of Article IV, Section 2, paragraph 1, of the Constitution of the United States, in that the complaint in the above entitled action sets forth as the basis of relief public acts and judicial proceedings of the State of New York within the intent and meaning of the Constitution of the United States. Said statute of the State of New Jersey, being con-

strued as prohibitive of said action, is void as repugnant to the section of the Constitution of the United States above referred to.

(8) Said statute of the State of New Jersey as construed and applied by the order and judgment of the Supreme Court, and the judgment of the Court of Errors and Appeals, is in violation of the Constitution of the United States, and particularly the Fourteenth Amendment thereof, and is therefore null and void.

(9) Said statute of the State of New Jersey, which would deny to the appellant any relief in the cause of action stated in the complaint, other than in the nature of an equitable accounting for the proportionate benefit of all parties interested, to which The Bank of United States and its legal representatives, and all of its creditors (aggregating over four hundred thousand in number), and all of its stockholders (aggregating over twenty thousand), shall be necessary parties, is so unreasonable and so burdensome as to be impossible of performance, by reason whereof said statute, as construed by the New Jersey Court of Errors and Appeals, deprives appellant of his property as Superintendent of Banks of the State of New York in assessments duly levied by him against stockholders of The Bank of United States residing in New Jersey, without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

The New Jersey Court of Errors and Appeals affirmed the judgment of the Supreme Court upon the opinion of Mr. Justice PARKER in the court of original jurisdiction (Record, pp. 29-31).

Appellant then sued out a writ of error to this Court, specifying as grounds of appeal the assignments of error above referred to, which was allowed by the presiding

Judge of the New Jersey Court of Errors and Appeals (R., pp. 31, 32), and probable jurisdiction was noted by this Court on ~~October~~ Dec. 3, 1934.

POINT I.

Section 94b of the New Jersey Corporation Act, and the final judgment of the Court below based thereon, deny to Article VIII, Section 7, of the Constitution of New York and Sections 80 and 120 of the New York Banking Law, and to the Public Act of the Superintendent of Banks of New York in levying an assessment against the stockholders of the Bank of United States pursuant thereto, the full faith and credit required under Article IV, Section 1, of the Constitution of the United States.

The measure of full faith and credit must be determined by reference to the statutes and decisions of the courts of the State of New York (*infra*, pp. 38 to 70).

We will therefore first discuss: (1) those provisions of the Constitution and the Banking Law of New York which provide that all stockholders of banks incorporated under the New York laws shall be liable for an assessment in addition to, but not exceeding in amount, the par value of their stock, *infra* pp. 14 to 17; and (2) the statutory method embodied in Sections 80 and 120 of the New York Banking Law of determining whether an assessment is necessary and the amount thereof, *infra* pp. 17 to 38; and continue with a discussion of the determinative questions of, (3) the extent to which such provisions of the New York Constitution and its Banking Law, and the levy of an assess-

ment against bank stockholders thereunder by the New York Superintendent of Banks, are entitled under the Constitution of the United States, to full faith and credit in jurisdictions other than New York, *infra* pp. 38 to 70; and (4) the manner in which Section 94b of the New Jersey Corporation Act, and the final judgment dismissing the complaint in this action, denies to the Constitution and statutes of New York and the official acts of the New York Superintendent of Banks thereunder in levying an assessment against the stockholders of The Bank of United States, that full faith and credit to which they are entitled under Article IV, Section 1, of the Constitution of the United States, *infra* pp. 71 to 82.

A.

Under Article VIII, Section 7, of the New York Constitution and Sections 120 and 80 of the New York Banking Law, as Interpreted by the New York Courts, All Stockholders of New York Banks Are Subject to a Statutory, Double Liability.

Specific imposition of an additional assessment liability of New York bank stockholders was first made in the Constitution of New York of 1846, Article VIII, Section 7. The Constitution of 1846 provided that all stockholders of banks issuing paper currency should be liable for an assessment in excess of their orginal subscriptions in the event of insolvency. Article VIII, Section 7, of the New York Constitution of 1846 was attacked as violative of the Constitution of the United States and sustained in *Matter of Oliver Lee & Co.'s Bank*, 21 N. Y. 9, affirmed by this Court *sub nom Sherman* v. *Smith*, 1 Black 587, 17 L. ed. 163. Subsequently and by the Constitution of New York of 1894, Article VIII, Section 7 was amended to read as follows:

"§7. *Liability of bank stockholders.*

"The stockholders of every corporation and joint-stock association for banking purposes, shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind."

As so revised, this provision of the New York Constitution has continued, without change or modification, since that time. The liability created under this constitutional provision has been uniformly enforced by the New York courts [*Matter of Oliver Lee & Co.'s Bank*, 21 N. Y. 9; *Matter of Reciprocity Bank*, 22 N. Y. 9; *Matter of Hollister Bank*, 27 N. Y. 393; *Barnes* v. *Arnold*, 23 Misc. (N. Y.) 197, 51 N. Y. Supp. 1109, *aff'd* 45 App. Div. 314, 61 N. Y. Supp. 85, *aff'd* 169 N. Y. 611; *Hirshfeld* v. *Bopp*, 145 N. Y. 84; *Hirshfeld* v. *Fitzgerald*, 157 N. Y. 166; *Persons, et al.* v. *Gardner*, 26 Misc. (N. Y.) 663, 56 N. Y. Supp. 822, *aff'd* 42 App. Div. 490, 59 N. Y. Supp. 463; *Gause* v. *Boldt*, 49 Misc. (N. Y.) 340, 99 N. Y. Supp. 442; *aff'd* 115 App. Div. 897, 100 N. Y. Supp. 1117, *aff'd* 188 N. Y. 546; *Van Tuyl* v. *Scharmann*, 208 N. Y. 53; *Van Tuyl* v. *Robin*, 80 Misc. (N. Y.) 360, 142 N. Y. Supp. 535, *aff'd* 160 App. Div. 41, 145 N. Y. Supp. 121; *Van Tuyl* v. *Schwab*, 165 App. Div. 412, 150 N. Y. Supp. 786; *Van Tuyl* v. *Sullivan*, 156 N. Y. Supp. 309—not officially reported; *Skinner* v. *Schwab*, 188 App. Div. 457, 177 N. Y. Supp. 143, *aff'd* 229 N. Y. 549; *Broderick* v. *Aaron, et al.*, 264 N. Y. 368; *Broderick* v. *Normandie National Securities Corp.*, 240 App. Div. 409, 269 N. Y. Supp. 718, *aff'd* 265 N. Y. 98; *Broderick* v. *Adamson, et al.*, 148 Misc. (N. Y.) 353, 265 N. Y. Supp. 804; *Broderick* v. *Aaron, et al.*, 151 Misc. (N. Y.) 516, 272 N. Y. Supp. 219].

The New York courts have also discussed the nature of the assessment liability and have repeatedly held that it is not a statutory penalty, but a liability contractual in character (*Corning* v. *McCullough*, 1 N. Y. 47; *Cochrane* v. *Wiechers*, 119 N. Y. 399; *Lowry* v. *Inman*, 46 N. Y. 119; *Wiles* v. *Suydam*, 64 N. Y. 173; *Bailey* v. *Hollister*, 26 N. Y. 112; *Van Tuyl* v. *Schwab*, 174 App. Div. 665, 161 N. Y. Supp. 323, *aff'd* 220 N. Y. 661; *Howarth* v. *Angle*, 162 N. Y. 179, at 187; *Broderick* v. *Normandie National Securities Corp.*, 240 App. Div. 409, 269 N. Y. Supp. 718, *aff'd* 265 N. Y. 98; *Broderick* v. *Adamson* (*Dixon & Co.*), 240 App. Div. 279, 268 N. Y. Supp. 766). Describing the nature of the assessment contract, the New York Court of Appeals said, in *Lowry* v. *Inman*, 46 N. Y. 119:

> "A personal liability of stockholders for the debts of a corporation, in virtue of the charter, is not in the nature of a penalty or forfeiture, and does not exist solely as a liability imposed by statute. It is not enforced simply as a statutory obligation, but is regarded as voluntarily assumed by the act of becoming a stockholder. By such acts he assents to be bound, or that his property shall be charged with debts of the corporation, to the extent and in the manner prescribed by the act of incorporation."

This accords with the decisions of this Court (*Flash* v. *Conn*, 109 U. S. 371; *Hancock National Bank* v. *Farnum*, 176 U. S. 640; *Whitman* v. *National Bank of Oxford*, 176 U. S. 559; *Bernheimer* v. *Converse*, 206 U. S. 516; *Converse* v. *Hamilton*, 224 U. S. 243; *Selig* v. *Hamilton*, 234 U. S. 652; *Marin* v. *Augedahl*, 247 U. S. 142).

The terms of the assessment contract of National Bank stockholders were defined in *Deweese* v. *Smith*, 106 Fed.

438 (C. C. A. 8th), *aff'd sub nom Smith* v. *Brown*, 187 U. S. 637, as follows:

> "The liability of a shareholder of a national bank is contractual. It rests on his subscription for or his receipt and acceptance of his stock. By that act he agrees to be a shareholder of the bank, and to assume and discharge all the legal obligations and duties of such a shareholder. Bank *vs.* Hawkins, 174 U. S. 365, 370, 19 Sup. Ct. 739, 43 L. Ed. 1007. Upon familiar principles the acts of congress and the settled rules of law to which reference has been made are necessarily read into and become a part of every stockholder's contract. *The agreement of the shareholder with the bank and its creditors thus becomes a contract that, to an amount not exceeding the par value of his shares of stock, and not exceeding his equal and ratable proportion, he will pay, at such times and in such amounts as the comptroller of the currency shall decide to be necessary and shall demand, the debts and obligation of his bank,* Rev. St., Sections 5151, 5234; Kennedy *vs.* Gibson, 8 Wall. 498, 19 L. Ed. 476." (Italics ours.)

B.

Under Section 80 of the New York Banking Law, as Interpreted by the New York Courts, the Levy of an Assessment by the Superintendent of Banks is an Official or Public Act, and Conclusive in the Absence of Fraud, Bad Faith, or Clear Error of Law.

By New York Laws of 1914, Chapter 369, the present Section 80 of the New York Banking Law was enacted. Section 80 specifically provides that after the Superintendent:

> "* * * *has determined from his examination of its affairs* that the reasonable value of the assets of

> such corporations is not sufficient to pay its creditors in full, *he may enforce* the individual liability of such stockholders in whole or in part." (Italics ours.)

The statute then provides:

> "In case *he determines* to enforce such liability, he shall make demand in writing upon such stockholders by causing such demand to be enclosed in sealed envelopes addressed and mailed, postage prepaid to said respective stockholders at their last known places of address as the same appear upon the stock ledger of such corporation or at their last known address if no address appears in said ledger." (Italics ours.)

The statute then specifies the following terms of such demands:

> "Such demands shall state the total amount *assessed by the superintendent* against the stockholders and the equal and pro rata share assessed against each stockholder for each share of stock, and the total amount of such assessment for all the shares of stock of such stockholder. Such demand shall also fix a date, not earlier than thirty days from the date of such notice, upon which such stockholders shall be *required* to pay such assessment to the superintendent." (Italics ours.)

The statute then specifies the effect of failure by stockholders to comply with the notice of assessment and demand for its payment, in the following language:

> "In case any such stockholder shall fail or neglect to pay such assessment within the time fixed in said notice, *the superintendent shall have a cause of*

> *action,* in his own name as superintendent of banks, against such stockholder either severally or jointly with other stockholders of such corporation, *for the amount of such unpaid assessment or assessments, together with interest thereon from the date when such assessment was, by the terms of said notice, due and payable.*" (Italics ours.)

Thus, Section 80, specifically: (1) authorizes the Superintendent to examine into the reasonable value of the assets and the amount of the liabilities of banks in his possession for purposes of liquidation, and to decide whether or not an assessment is necessary and, if so, the amount thereof; (2) directs the Superintendent to issue a notice of his determination to levy the assessment and of the amount assessed by him, and to demand payment thereof in writing within a period not shorter than thirty days from the date of the notice; and (3) vests in the Superintendent a cause of action for the amount unpaid upon the due date of the demand, together with interest thereon from such due date. It is thus clear that the power to determine whether or not an assessment is necessary and to levy an assessment, is vested in the Superintendent.

It is universal doctrine that official action taken by executive officers pursuant to statutory authority is presumed to be valid, and may be reviewed by the courts only upon grounds of clear error of law, fraud, or bad faith (*Marbury* v. *Madison,* 1 *Cranch* (U. S.) 137; *Leland* v. *Cameron,* 31 N. Y. 115; *People* v. *Diamond,* 233 N. Y. 130; *In re Whitman,* 225 N. Y. 1; *Hirshfeld* v. *Craig,* 239 N. Y. 98; *Schiefflein* v. *Goldsmith,* 253 N. Y. 243; *People ex rel. Lieberman* v. *Vandecarr,* 175 N. Y. 440).

The revised New York Banking Law of 1914, which vested in the New York Superintendent of Banks the power

to take possession of and liquidate New York banks and to levy and enforce the assessment liability against their stockholders, was derived largely from the provisions of the National Banking Act.

In *Van Tuyl* v. *Scharmann,* 208 N. Y. 53, the Court pointed out that the scheme of the New York Banking Law with regard to the levy and enforcement of assessments conformed to the National Banking Act, saying:

> "*The same general plan prevails in the liquidation of national banks by the comptroller of the currency,* and the relief sought by the complaint in this action is similar to the relief which was theretofore obtained in proceedings authorized to be taken against stockholders of bank corporations to enforce the liability imposed upon them by article 8, section 7, Constitution of 1846 (Laws of 1849, chapter 226; Banking Law of 1882, chapter 409, article 6), and which was sustained by this court in *Matter of Empire City Bank* (18 N. Y. 199)." (Italics ours.)

In *Matter of Union Bank,* 176 App. Div. 477, 163 N. Y. S. 485, the Court pointed out:

> "The learned Special Term in its opinion quotes, as instructive as to the legislative change in functions of the superintendent, from messages of Govs. Odell and Higgins, and in the part quoted from Gov. Odell are these words, referring to banks and insurance companies:
>
> " 'They should be placed entirely under the control of the State Banking and Insurance Departments, and our laws should be made to conform to the federal statutes relating to national banks.'
>
> "Comparison of 13 U. S. Statutes at Large, pp. 114, 115, with our Banking Law, indicates that the Executive's recommendations were adopted."

In discussing the accrual of the cause of action in its relation to the statute of limitations and applying the rule of the Federal courts, Mr. Justice Lydon, in *Broderick* v. *Aaron, et al.*, 151 Misc. 516, 272 N. Y. Supp. 219, said:

> "The Banking Law of this state was amended and revised to conform generally our scheme of bank regulation, liquidation and assessment enforcement to the statutory system applicable to national banks conducted through the Comptroller of Currency (Matter of Union Bank, 204 N. Y. 313; Van Tuyl *v.* Scharmann, 208 N. Y. 53; see Report of the Commission on Banks, December, 1907; Report of Superintendent of Banks, 1908, Senate Document No. 6, 131 Session, page XXIX). The test of the accrual of the cause of action laid down by the federal courts should therefore control."

Under the National Banking Act the Comptroller of Currency is vested with the power to decide whether or not an assessment against National Bank stockholders is necessary. In view of the source of the revised New York Banking Law and its legislative assimilation to the National Banking Act, the decisions by the Federal courts upon the weight and effect to be given to the determination by the Comptroller of Currency are of special importance in ascertaining the effect of the similar determination by the New York Superintendent of Banks of the necessity of resorting to the assessment liability of stockholders of insolvent New York Banks.

In *Kennedy* v. *Gibson*, 75 U. S. 476, 8 Wall. 498, the following discussion of the effect to be given to the Comptroller's determination to levy an assessment appears:

> "It is for the comptroller to decide when it is necessary to institute proceedings against the stock-

holders to enforce their personal liability, and whether the whole or a part, and, if only a part, how much, shall be collected. *These questions are referred to his judgment and discretion, and his determination is conclusive.* The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper and upon such data as shall be satisfactory to him. This action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver * * *." (Italics ours.)

The same result was reached in *Casey* v. *Galli*, 94 U. S. 673; *Germania National Bank* v. *Case*, 99 U. S. 628; *Studebaker* v. *Perry*, 184 U. S. 258. Referring to the numerous prior decisions of this court, Mr. Justice SANBORN said in *Deweese* v. *Smith*, 106 Fed. 438 (C. C. A. 8th), affirmed *sub nom*, *Smith* v. *Brown*, 187 U. S. 637:

> "The acts of congress confer the power and impose the duty upon the comptroller to determine within the statutory limit the amounts that shall be paid by each stockholder upon his individual liability, and the times when he shall pay these amounts. The liability of the shareholder does not mature—does not become due—until the comptroller adjudges it to be payable and demands it, and it falls due in such amounts and at such times as he decrees. Kennedy *vs.* Gibson, 8 Wall. 498, 505, 19 L. Ed. 476; U. S. *vs.* Knox, 102 U. S. 422, 425, 26 L. Ed. 216; Bank *vs.* Case, 99 U. S. 628, 634, 25 L. Ed. 448; Casey *vs.* Galli, 94 U. S. 673, 681, 24 L. Ed. 168; Bushnell *vs.* Leland, 164 U. S. 684, 685, 17 Sup. Ct. 209, 41 L. Ed. 598. . . .
>
> "The liability of a shareholder of a national bank is contractual. It rests on his subscription for or his

receipt and acceptance of his stock. By that act he agrees to be a shareholder of the bank, and to assume and discharge all the legal obligations and duties of such a shareholder. Bank *vs.* Hawkins, 174 U. S. 365, 370, 19 Sup. Ct. 739, 43 L. Ed. 1007. Upon familiar principles the acts of congress and the settled rules of law to which reference has now been made are necessarily read into and become a part of every stockholder's contract. *The agreement of the shareholder with the bank and its creditors thus becomes a contract that, to an amount not exceeding the par value of his shares of stock, and not exceeding his equal and ratable proportion, he will pay, at such times and in such amounts as the comptroller of the currency shall decide to be necessary and shall demand, the debts and obligations of his bank,* Rev. St., Sections 5151, 5234; Kennedy *vs.* Gibson, 8 Wall. 498, 19 L. Ed. 476." (Italics ours.)

Judge SANBORN also said, at page 445:

"Under the acts of congress and the decisions of the courts to which reference has been made the comptroller of the currency constitutes a quasi judicial tribunal, to whose exclusive determination congress has intrusted the decision in the first instance of the questions, what proportion of the full liability of the stockholder of an insolvent bank it is necessary to collect to pay its debts, and when this amount shall be paid. *His decisions of questions within his jurisdiction are, like the decisions of the land department and of the other quasi judicial tribunals, impervious to collateral attack, and open to avoidance by the Court only in a direct attack upon them on the grounds of clear error of law, fraud, or mistake.* U. S. *vs.* Knox, 109 U. S. 422, 425; 26 L. Ed. 216; U. S. *vs.* Northern Pac. R. Co., 95 Fed. 864, 870, 37 C. C. A. 290, 296; Bogen *vs.* Mortgage Co., 63 Fed. 192, 195

11 C. C. A. 128, 130, 27 U. S. App. 346, 350; U. S. *vs.* Winona & St. P. R. Co., 67 Fed. 948, 959, 15 C. C. A. 96, 107, 32 U. S. App. 272, 289." (Italics ours.)

It is therefore firmly established that the determination by the Comptroller of Currency of the necessity of an assessment, is binding and conclusive upon stockholders in the absence of fraud, bad faith, or clear error of law. As appears from the excerpts above quoted, this is but an application or extension of the underlying doctrine firmly embedded not only in the Federal cases, but also in the New York decisions above cited (*supra,* p. 19), that where a matter involving the exercise of judgment or discretion is properly delegated to executive officers, their official action is conclusive within the limitations already noticed.

It has been repeatedly held by the courts of New York that official action taken by the Superintendent in suspending a New York bank, in liquidating its assets and in determining to enforce the assessment liability of its stockholders, is entitled to the identical conclusive effect which attaches generally to official action of executive officers, in the absence of fraud, bad faith or clear error of law.

Thus in *Matter of Lunghino,* 176 App. Div. 285, 163 N. Y. Supp. 9, the Superintendent took possession of S. Lunghino & Sons, private bankers, who thereupon moved, under what is now Section 60 of the New York Banking Law, for an order ousting the Superintendent from possession. At Special Term an order was entered directing the Superintendent to surrender possession under the terms of a plan approved by the court, but not by the Superintendent. In reversing the order of the Special Term, the Appellate Division said:

"The appellant contends that the order of the court was entirely unauthorized, and that thereby the court assumed prerogatives with which the law did not invest it. We think the appellant is correct in such interpretation of the law. In the enactment of the Banking Law of the state, the Legislature adopted a well-defined scheme with reference to private bankers to bring them directly under the control and supervision of the Superintendent of Banks. He was the officer invested by the Legislature to pass upon the character, responsibility, and general fitness of the person seeking to engage in the business of private banking. The act (section 48) provides that, whenever the approval of the superintendent is made a condition precedent to the doing of any act, it shall lie within his sound discretion to grant or refuse his approval. *The Legislature having confided the decision of a matter of a public nature to a public official with discretionary power to act in the premises, acts properly within such discretion are not subject to judicial review at the instance of some one claiming that a different decision should have been made. Ontario Knitting Co.* v. *City,* 205 N. Y. 416, 98 N. E. 909." (Italics ours.)

In *Matter of Union Bank,* 176 App. Div. 477, 163 N. Y. Supp. 485, the Appellate Division reviewed an order of the Special Term directing the Superintendent to complete the liquidation of the Union Bank of Brooklyn upon a date fixed by the court. In reversing the order of the Special Term, the Appellate Division said:

"I think that the court overlooked a distinction between the superintendent as a liquidator, and a receiver appointed by the court, that excluded the former from the power of the court exercised in this instance. The former common-law right of banking

is now a franchise derived from the Legislature (Attorney General *v.* Utica Ins. Co., 2 Johns. Ch. 377; People *v.* Utica Ins. Co., 15 Johns. 378, 8 Am. Dec. 243), and the superintendent is the head of the deprtment for the state regulation of such franchise. He is not a part of the judicial branch of the government. He does not take his office nor derive any of his original powers from it. * * * He is a state officer. Article 1, § 2, Public Officers Law (Consol. Laws, c. 47); People *ex rel.* Baird *v.* Nixon, 158 N. Y. 221, 52 N. E. 1117. * * *

"* * * when the court undertook thus to order the superintendent as a liquidator, it reached out to direct a state officer in the discharge of statutory duties, involving discretion, conferred upon him, not the court, when he and not the court was in custody of the assets. Section 70, Banking Law.

* * * * * *

"As I have said, the liquidation contemplated and authorized by the Banking Law is not the result of any action or proceeding in court. Liquidation does not necessarily require nor imply judicial proceedings. The appointment of an officer to act in liquidation outside of judicial proceedings or apart from the judicial branch of the government is not open to objection as vesting him with judicial power. Title Guaranty Co. *v.* Allen, 240 U. S. 136; Bushnell *v.* Leland, 164 U. S. 684, 17 Sup. Ct. 209, 41 L. Ed. 598; In re Chetwood, 165 U. S. 458, 17 Sup. Ct. 385, 41 L. Ed. 782. See, too, Vil. of Saratoga Spgs. *v.* Saratoga G., etc., Co., 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713. * * * "

* * * * * *

"* * * It is not for the court to set itself above the judgment and discretion of administrative officers to whom the law commits a decision, for thereby

the court but confronts its opinion with his opinion. Morgan *v.* City of Binghamton, 102 N. Y. at 504. * * *"

In *Isaac* v. *Marcus,* 258 N. Y. 257, the Court held that the Superintendent's right to enforce the liabilities of directors for negligence and misfeasance was paramount, saying:

"The Superintendent of Banks, as we have said, is, in effect, a statutory receiver. He is not an officer of the court and he derives his powers from the fiat of the Legislature. The Legislature pursuant to its power to regulate banking and to create banking corporations, has provided that the Superintendent of Banks shall supersede the officers and stockholders of the corporation in the control of the corporate affairs. In him the Legislature has vested not only broad powers but broad discretion. * * *

* * * * * *

"* * * *The court may not substitute its discretion for his own where the statute leaves discretion to him.* * * *"* (Italics ours.)

To like effect see *Matter of Broderick,* 235 App. Div. 281, 257 N. Y. S. 382.

Broderick v. *Adamson, et al.,* 148 N. Y. Misc. 353, was the first action in New York to recover the assessment levied against the stockholders of The Bank of United States. It was in the nature of a test suit brought against a selected group of defendants. The record in that case shows that the defendants organized a protective committee which in turn retained accountants, and that the Superintendent extended the privilege to these accountants of examining the data and appraisals upon which his deter-

mination to levy a 100% assessment against the stockholders of The Bank of United States was based. The record also shows that upon the trial, the defendants were permitted, without objection by counsel for the Superintendent, to offer evidence of the value of the assets which they asserted contradicted the Superintendent's determination that the assessment was necessary. In rendering judgment in favor of the Superintendent, Mr. Justice LYDON said:

> "While the question was not presented upon the trial, it would seem appropriate, in view of the large body of litigation pending and prospective involving the enforcement of assessments against bank stockholders, to state my views with respect to the effect and weight to be given to the certificates provided for under section 80 of the Banking Law. It is my opinion that this certificate, in the absence of a showing of fraud, illegality, bad faith, or obvious error, constitutes conclusive evidence of the facts therein stated. This is the rule of the federal courts in actions to enforce the statutory liability of stockholders of national banks. Kennedy *v.* Gibson, 8 Wall. 498, 19 L. Ed. 476; Studebaker *v.* Perry, 184 U. S. 258, 22 S. Ct. 463, 46 L. Ed. 528, The National Banking Act (see 12 USCA § 21 et seq.) contains no provision similar to that of section 80, and the rule applied in the federal jurisdictions rests upon no positive statute but merely upon the presumption of good faith and regularity attending the performance of official acts. Isaac *v.* Marcus, 258 N. Y. 257, 179 N. E. 487; Matter of Broderick (Matter of Bank of Canastota), 235 App. Div. 281, 257 N. Y. S. 382; Matter of Lunghino & Sons, 176 App, Div. 285, 163 N. Y. S. 9. There is neither logic nor reason in the principle that the certificate of the superintendent

> may be overthrown upon the basis of mere differences of opinion between the superintendent and the experts and witnesses of the defendants in relation to reasonable values. The determination of the superintendent is essentially and peculiarly an administrative act resting upon the exercise of sound business judgment and discretion. Banking Law, § 80; Matter of Union Bank of Brooklyn, 176 App. Div. 477, 163 N. Y. S. 485. If not infected with bad faith or obvious error, or violative of any fixed legal principle, it should not be subject to attack upon the theory that the preponderance of evidence, in the opinion of the trier of the facts, indicates that the values as fixed by the superintendent are merely erroneous. Liquidation presupposes the prompt and speedy conversion of assets to cash in the interests of creditors, and the right to enforce and collect the assessment should not be subject to defeat by the mere balancing of the opposing opinions and views of expert witnesses upon the questions of reasonable values. If it should ultimately appear that the assessment was unnecessary in whole or in part, the stockholders are entitled to share in any remaining surplus (Banking Law, § 79). As between the stockholder and the creditor, it is the convenience of the latter that is preferred by the courts. * * *"

Broderick v. *American General Corporation, et al.*, 71 F. (2d) 864 (C. C. A. 4th) was an action by the New York Superintendent of Banks to enforce the assessment against stockholders of The Bank of United States residing in Maryland. In holding that the determination of the Superintendent of Banks was conclusive and that therefore his remedy was at law and not in equity, the Circuit Court of Appeals, in an opinion by PARKER, J., said:

"But in addition to this, we think that the certificate of the Superintendent of Banks, in the absence of attack on the ground of fraud, illegality, bad faith, or obvious error, is conclusive as to the necessity for the stock assessment. That assessment was made pursuant to the laws of New York. The stockholders in purchasing stock in a corporation of that state consented to the obligations imposed by its laws upon the ownership of such stock; and the effect of the assessment by the Superintendent of Banks and his certificate thereon is to be determined by reference to those laws. * * *

* * * * * *

"These statutes were adopted in 1908 after the banking troubles of the preceding year; and their purpose was to provide a plan for the liquidation of banks under a department of the state similar to that provided for national banks under the Comptroller of the Currency. Van Tuyl *v.* Scharmann, 208 N. Y. 53, 101 N. E. 779, 782; Broderick *v.* Aaron, 151 Misc. 516, 272 N. Y. S. 219. As said in the case last cited:

> " 'The banking law of this state was amended and revised to conform generally our scheme of bank regulation, liquidation and assessment enforcement to the statutory system applicable to national banks conducted through the comptroller of currency (Matter of Union Bank, 204 N. Y. 313, 97 N. E. 737; Van Tuyl *v.* Scharmann, 208 N. Y. 53, 101 N. E. 779; see Report of the Commission on Banks, December 1907; Report of Superintendent of Banks, 1908, Senate Document No. 6, 131 Session, page XXIX). The test of the accrual of the cause of action laid down by the federal courts should therefore control.'

"It is, of course, well settled that the decisions of the Comptroller of the Currency are conclusive as to the assessments levied against stockholders of insol-

vent national banks for the purpose of enforcing their statutory liability. Kennedy *v.* Gibson, 8 Wall 505; Studebaker *v.* Perry, 184 U. S. 258; Liberty Nat. Bank *v.* McIntosh (C. C. A. 4th), 16 Fed. (2d) 906, 909. In the case last cited, this court said:

> " 'The decisions of the Comptroller of the Currency are not subject to collateral attack, nor is his assessment against shareholders, and the amount thereof open to review; but, on the contrary, neither the bank nor the shareholders, clearly in the absence of fraud charged and proved, are entitled to a judicial determination of any question involved in his decision either as to the solvency, the sum due creditors and the amount of assessments as ordered, such matters one and all being exclusively within the judgment and discretion of the Comptroller, and as to which he acts in a quasi judicial capacity. Kennedy *v.* Gibson, *supra*, 75 U. S. 498, 19 L. Ed. 476; Casey *v.* Galli, 94 U. S. 673, 24 L. Ed. 168; United States *v.* Knox, 102 U. S. (12 Otto) 422, 26 L. Ed. 216; Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 238, 33 L. Ed. 564; Bushnell *v.* Leland, 164 U. S. 684, 17 S. Ct. 209, 41 L. Ed. 598; Hightower *v.* Bank, 263 U. S. 351, 44 S. Ct. 123, 68 L. Ed. 334; Deweese *v.* Smith (8th C. C. A.), 106 F. 438, 66 L. R. A. 971.'

"While the question here involved seems not to have been decided by the Court of Appeals of New York, it has been before the Supreme Court of that state in Broderick *v.* Adamson, 148 Misc. 353, 265 N. Y. S. 804, and the language of Mr. Justice Lydon in dealing with the question is convincing. • • •

"While this is not the expression of the highest court of the state in the interpretation of its statute, it is entitled to great weight, not only because it emanates from one of the courts of the state charged with the duty of applying the statute, but also because of

its appeal as being inherently reasonable and necessary. *The statute gives a cause of action for the amount of the assessment made against each stockholder, not for the amount which the court may deem necessary to meet the bank's indebtedness.*

"The Superintendent of Banks is authorized to determine himself the necessity for the assessment, not to bring an action to have the court determine it. He may sue the stockholders severally as well as jointly for the amounts due under the assessments levied; and surely it was not contemplated by the legislature that in each suit the court should wade through all the facts and figures involved in the bank's assets and liabilities to make the determination which the legislature had already authorized the Superintendent himself to make, with possibility of conflict between the decisions of different courts in different cases affecting stockholders of the same bank. It is said that the certificate of the Superintendent of Banks is made only presumptive evidence by the last sentence of Section 80; but we think that by this sentence it was intended to make clear that the certificate of the Superintendent should be accorded that presumption of correctness which attaches to official acts of administrative officers, not to detract from the strength of the presumption which would attach to it in the absence of statute. We think that the interpretation placed upon the statute by Mr. Justice LYDON is correct." (Italics ours.)

The decision of *Cheney* v. *Scharmann*, 145 App. Div. 456, 129 N. Y. Supp. 993 (1911), does not conflict with this conclusion. That case was decided under the Banking Law prior to its revision in 1914 under which it was provided merely that the Superintendent "may, if necessary to pay the debts of such corporation, enforce the individual liability of the stockholders." The former Banking Law

merely authorized the Superintendent to institute a law suit to enforce an assessment if necessary for the payment of creditors. The beginning of such a suit constituted merely the general assertion of a claim, the validity and merit of which were subject to judicial determination, similar to a claim brought by any private party. The initiation of the law suit by the Superintendent carried with it no presumptions or implications in aid of the validity of the claims asserted against the stockholders. Upon the trial, the Superintendent was bound to take the laboring oar and establish each and every element of his case by common law evidence, unaided by any presumptions in his favor. The court adopted the view that the Superintendent under this section of the old Banking Law was not authorized or empowered to determine the necessity of, or to levy the assessment, and no preliminary act or decision upon his part in any wise affected the ultimate liability of the stockholder. It is fair to say that the legislature largely because of this decision completely changed the authority of the Superintendent in relation to the levy and enforcement of the assessment by specifically conferring upon him the powers which were omitted from the earlier act. Under the present Section 80 enacted in 1914, and pursuant to which the present assessment was levied, the Superintendent determines the necessity of the assessment as an administrative act, and fixes the amount of such assessment and the date when the same shall become due and payable. Should the stockholder neglect to pay the amount of the assessment upon the date fixed, it is provided that the Superintendent shall have a cause of action in his own name against the defaulting stockholder and that interest shall accrue from the due date fixed in the notice or demand.

In other words, the necessity of the assessment is determined and the liability to pay arises prior to suit brought, in direct contradistinction to the language of the earlier statute considered in *Cheney* v. *Scharmann, supra.* Thus the Superintendent in an action brought subsequent to the enactment of Section 80, upon the trial is clothed with his official determination, which continues conclusive until attacked and overthrown upon the grounds already indicated. These considerations as well as those pointed out by PARKER, J. in *Broderick* v. *American General Corp., supra,* we submit sufficiently dispose of the contrary view expressed in *Broderick* v. *McGuire,* 119 Conn. 83, 174 Atl. 314, which will probably be relied upon by appellees.

Nor is that portion of Section 80 of the New York Banking Law providing that the Superintendent's certificate of the amount of the liabilities and the reasonable value of the assets of the bank, shall be presumptive evidence of the facts therein stated, opposed to our contention. The rule already fully discussed in this brief that official action pursuant to statutory authority is conclusive in the absence of fraud, bad faith or obvious error is commonly defined as a rule that official action is presumed to be valid in the absence of fraud, bad faith or obvious error. The New York decisions referred to, *supra,* pages 19, 24 to 29, as well as the decisions of this Court in relation to the levy of assessments by the Comptroller of Currency referred to, *supra,* pages 21 to 24, that the official levy is conclusive with exceptions already noted, is the identical principle incorporated in Section 80 of the New York Banking Law which provides that the certificate by the Superintendent of the necessity of the assessment shall be presumptive evidence of the facts therein recited. (*Broderick* v. *Adamson,*

et al., 148 N. Y. Misc. 353, 265 N. Y. Supp. 804; *Isaac* v. *Marcus*, 258 N. Y. 257; *People ex rel. Lieberman* v. *Vandecarr*, 175 N. Y. 440, 446; *People* v. *Diamond*, 233 N. Y. 130; *Matter of Broderick*, 235 N. Y. App. Div. 281; *Matter of Union Bank*, 176 N. Y. App. Div. 477; *Matter of Lunghino*, 176 N. Y. App. Div. 285; *Kennedy* v. *Gibson*, 75 U. S. 476; *Deweese* v. *Smith*, 106 Fed. 438, affirmed *sub nom Smith* v. *Brown*, 187 U. S. 637). Referring to this precise situation, the Court said, in *Broderick* v. *American General Corporation, et al.*, 71 Fed. (2d) 864 (C. C. A. 4th):

> "It is said that the certificate of the Superintendent of Banks is made only presumptive evidence by the last sentence of Section 80; but we think that by this sentence it was intended to make clear that the certificate of the Superintendent should be accorded that presumption of correctness which attaches to official acts of administrative officers, not to detract from the strength of the presumption which would attach to it in the absence of statute. We think that the interpretation placed upon the statute by Mr. Justice LYDON is correct."

It is equally well settled, both in relation to the New York Banking Law and the National Banking Act from which it was derived, that the delegation to the National Comptroller of Currency or the New York Superintendent of Banks of the power, quasi-judicial in nature, of determining whether or not an assessment is necessary, was proper. In *Bushnell* v. *Leland*, 164 U. S. 684, this Court said:

> "All these alleged errors may be reduced to the single contention that under the national banking law the comptroller of the currency is without power to appoint a receiver to a defaulting or insolvent

national bank, or to call for a ratable assessment upon the stockholders of such bank, without a previous judicial ascertainment of the necessity for the appointment of the receiver and of the existence of the liabilities of the bank, and that the lodgment of authority in the comptroller, empowering him either to appoint a receiver or to make a ratable call upon the stockholder, is tantamount to vesting that officer with judicial power in violation of the Constitution. All of these contentions have been long since settled, and are not open to further discussion. *Kennedy* v. *Gibson*, 75 U. S. 8 Wall. 498; *Casey* v. *Galli*, 94 U. S. 674; *United States* v. *Knox*, 102 U. S. 423. * * *"

In *Ex parte Chetwood*, 165 U. S. 443, it was pointed out:

"The receiver was appointed by the comptroller of the currency, January 14, 1889, and Chetwood commenced his suit * * * July 19, 1890. The receiver was not the officer of any court, but the agent and officer of the United States, as ruled by Mr. Justice GRAY, on circuit, in *Price* v. *Abbott*, 17 Fed. Rep. 506, and by Mr. Justice JACKSON, then circuit judge, in *Armstrong* v. *Trautman*, 36 Fed. Rep. 276. And see *Porter* v. *Sabin*, 149 U. S. 473, 470; *Platt* v. *Beach*, 2 Ben. 303; *Frelinghuysen* v. *Baldwin*, 12 Fed. Rep. 395; *Armstrong* v. *Ettlesohn*, 36 Fed. Rep. 209.

"It has been so often decided that the authority vested in the comptroller to appoint a receiver of a defaulting or insolvent national bank, or to call for a ratable assessment upon its stockholders, is not open to objection because vesting that officer with judicial power in violation of the Constitution that we have recently declined to re-examine that question."

In *Matter of Union Bank*, 176 App. Div. 477, 163 New York Supp. 485, the same view was announced.

The propriety of delegating to the Superintendent the power to levy and enforce assessments, although not expressly at issue, was sustained without discussion in *Van Tuyl* v. *Scharmann*, 208 N. Y. 53; *Van Tuyl* v. *Sullivan*, 156 N. Y. Supp. 309 (not officially reported); *Van Tuyl* v. *Lewis*, 165 App. Div. 865; *Broderick* v. *Aaron, et al.*, 264 N. Y. 368; *Broderick* v. *Normandie National Securities Corporation*, 265 N. Y. 98; *Broderick* v. *Adamson*, 148 Misc. 353; *Broderick* v. *Aaron*, 151 Misc. 516.

Summarizing the New York law with relation to the assessment liability of stockholders of New York banks, it appears (1) that the assessment liability created by Article VIII, § 7 of the New York constitution is contractual in nature under which stockholders agree to pay pursuant to the method of enforcement embodied in the banking law; (2) that under the banking law, the New York Superintendent of Banks is authorized to determine whether or not an assessment is necessary, the amount thereof and to levy such assessment, and that upon the failure of stockholders to respond to the Superintendent's levy and demand, he becomes possessed of a cause of action for its enforcement; (3) that the Superintendent's determination that an assessment is necessary and the amount thereof is conclusive in the absence of proof of fraud, bad faith, or clear error of law; and (4) that the delegation to the New York Superintendent of Banks of the power to levy assessments is valid.

We now turn to an examination of Article 4, Section 1, of the Constitution of the United States under which public acts, records and judicial proceedings of each State are entitled to full faith and credit in all other States, and the decisions of this Court applying that constitutional provi-

sion to statutes similar to the New York laws creating the assessment liability of New York stockholders and providing the method of its levy and enforcement.

C.

Under Article IV, Section 1, of the United States Constitution, New Jersey is required: (1) To permit enforcement against stockholders of New York banks residing in New Jersey of the assessment liability provided under Article VIII, Section 7, of the New York Constitution and Sections 80 and 120 of the New York Banking Law; and (2) To recognize the official determination by the New York Superintendent of Banks of the necessity of such assessment, made pursuant to the provisions of Section 80 of the New York Banking Law.

Article IV, Section 1, of the Constitution of the United States provides:

> "Full faith and credit shall be given in each state to the public Acts, Records and judicial Proceedings of every other State."

The business of large metropolitan banks such as The Bank of United States is nationwide. Its depositors are drawn from all parts of the country and include residents of many states other than New York. Similarly, stock of the larger banks of one state is held by investors throughout the country. The interests and property rights, which the assessment liability provided under the Constitution and statutory provisions of New York protects, are therefore not local to the state of domicile of the bank, but extend throughout the entire nation. The entire Federal Reserve Bank system rests upon the familiar principle that banks, as distinguished from ordinary businesses, are affected

with a nationwide public interest to which Congress has recently extended additional safeguards through legislation guaranteeing the payment of all deposits up to a specified amount.

It is apparent that in this situation the rights of creditors and the liabilities of stockholders may be effectively enforced only pursuant to the laws of the state which grants the charter of incorporation and fixes such rights and liabilities. Unmeasurable confusion and havoc would ensue if peculiar and local statutes and policies are permitted to supersede or nullify the laws of the state creating the corporation and upon which depositors rely in depositing their funds.

Ordinarily, the doctrine of comity, in its customary and enlightened application, affords sufficient protection without resort to the full faith and credit provisions of the Federal constitution. While under the cases hereafter considered the right was upheld on principles of comity it is quite evident that the same result would have been reached under the compulsion of the full faith and credit clause if a determination had been directly required thereunder. Referring to the doctrine of comity, in its direct relation to assessment of enforcement the court in *Pulsifer* v. *Greene*, 96 *Me.*, 438 said:

> "The double liability of the stockholders of the corporation was created for the benefit of its creditors. While it is not an asset of the corporation, adds nothing to its pecuniary resources, and is not available to or enforceable by the corporation itself, it does add to its commercial credit. It is enforceable by its creditors, and persons who contract with and give credit to the corporation may well be presumed to do so upon the faith of the liability of its

stockholders. It is elementary that every person who voluntarily becomes a stockholder in a corporation thereby agrees to the terms of its charter. The law which created the defendant's liability was a part of the same system of laws which permitted him and his fellow stockholders to be a corporation. It is to be read into its charter. The two go together. He cannot with one hand grasp the benefit, and with the other reject the burden. When he voluntarily became a stockholder in the Clyde Banking Company, incorporated under the laws of the state of Kansas, he must be held to have contracted with reference to, and have agreed to be bound by, the laws of that state, which entered into and formed a part of the constitution of the company. The obligation which he thereby assumed, though statutory in its origin, was contractual in its nature, and as such not local, but transitory. It goes with him wherever he goes, and is enforceable in any court of competent jurisdiction. This result, which we believe to be consonant with reason and natural justice, is sustained by the weight of authority. Childs *v.* Cleaves, 95 Me. 498, 50 Atl. 714; Whitman *v.* Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. ed. 587; Bank *v.* Baker, 176 Mass. 294, 57 N. E. 603; Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; Flash *v.* Conn, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. ed. 966; Paine *v.* Stewart, 33 Conn. 516; Bank *v.* Lawrence, 117 Mich. 669, 76 N. W. 105; Bell *v.* Farwell, 176 Ill. 489, 52 N. E. 346, 42 L. R. A. 804, 68 Am. St. Rep. 194; Ferguson *v.* Sherman, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622; Howell *v.* Manglesdorf, 33 Kan. 199, 5 Pac. 759; Mor. Priv. Corp. Secs. 869, 871, 874."

The impossibility of effective enforcement of the assessment if the right is denied by states other than the state of

incorporation to resort to their courts for that purpose was pointed out in *Lewisohn* v. *Stoddard*, 78 Conn. 575, at page 598, in the following language:

> "The United States are founded upon the principle of freedom of commercial intercourse between citizens of the several states. Corporations of one state are commonly admitted by comity to do business in others * * *. When, as is true of most corporations with a considerable capital, some of the shareholders are citizens of the state granting the incorporation, and the rest are citizens of other states, no action to compel the discharge of stockholders' liabilities for the benefit of creditors can be brought in any forum before which all parties in interest can be compelled to appear. Unless then such an action can be maintained in a state, of which all shareholders are not citizens, and in which they cannot all be personally served with process, *a fatal defect would exist in the American system of remedial procedure.* The courts of the United States would be as powerless as those of a state; for their jurisdiction *in personam* is also under the arrangement of Federal Judicial Districts measured by State lines." (Italics ours.)

It may be noted that New York accords to comity its most broad and liberal application (*Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 110, 111). Numerous jurisdictions have, without invoking either comity or constitutional mandate, generally permitted executive officers of other states to enforce assessments, and have recognized the conclusive effect of their determinations of the necessity of resorting to the assessment liability though it is obvious from the reasoning that these decisions are supported by either comity or full faith and credit, or both [*Gile* v. *Duke*, 5 F. (2d) 952

(C. C. A. 9th); *Hansen* v. *Soderberg,* 105 Wash. 255; *Hansen* v. *Harris,* 145 Ore. 487, 28 Pac. (2d) 649; *Duke* v. *Olson,* 240 Ill. App. 198; *Commissioner of Banks* v. *Prudential Trust Co.,* 242 Mass. 78; *Broderick* v. *American General Corporation,* 71 F. (2d) 864. See also, *Broderick* v. *Stephano,* 314 Pa. 408, 171 Atl. (Pa.) 582; *Broderick* v. *McGuire,* 119 Conn. 83, 174 Atl. (Conn.) 314]. Other jurisdictions have refused to permit enforcement of assessments levied under the laws of different states. In such situations, this Court has repeatedly held that under the full faith and credit clause of the United States Constitution such states must recognize and give effect to the laws of the state of incorporation.

The paramount necessity of giving national effect to the law of the state of incorporation in such situations is fully discussed in *Royal Arcanum* v. *Green,* 237 U. S. 531. In that case the following facts were involved:

The Supreme Council of Royal Arcanum, a fraternal beneficiary corporation organized under the laws of Massachusetts to establish a fund for the benefit of its members, was authorized under its charter to amend its laws and constitution. Pursuant to its constitution, a lodge was organized in New York State, and one, Green, a resident of New York, became a member of this lodge. At that time his assessment was fixed at $1.80 per month. Thereafter, the Supreme Council increased the assessment of all members in the same class as Green to $6.87 per month. Green paid the increased assessment under protest. An action was begun in Massachusetts by certain other members to vacate and set aside the increase of assessments on the ground that it was invalid and violative of contractual rights. The Massachusetts court held that, under the char-

ter of incorporation and the laws of Massachusetts applicable thereto, the increase was valid (*Reynolds* v. *Supreme Council,* 192 Mass. 160). Several years later, Green ceased to make payments as required by the amended by-laws, and instituted an action in New York to vacate the increased assessment as illegal and void. The defense of the society was that New York must give full faith and credit to the Massachusetts laws under which the fraternity was incorporated, and the increased assessment authorized. The New York Court of Appeals, however, followed its own precedents with regard to fraternal societies organized under the laws of the state of New York, and held "that a membership contract in a mutual benefit association, in which the member agrees to comply with the laws of the order 'now in force or that may hereafter be adopted', does not authorize a subsequent amendment of the by-laws without the members' consent if the effect to such amendment is to increase the rate of assessment or to reduce the amount of the benefit as fixed by the contract" (206 N. Y. 591). In reversing the judgment of the New York Court of Appeals, Mr. Chief Justice WHITE, speaking for this Court, said:

> "It is not disputable * * * that all the rights of the complainant concerning the assessment to be paid * * * had their source in the constitution and by-laws, and *therefore their validity could be alone ascertained by a consideration of the constitution and by-laws.* This being true, it necessarily follows that resort to the constitution and by-laws was essential unless it can be said that the rights in controversy were to be fixed by disregarding the source from which they arose, and by putting out of view the only considerations by which their scope could be ascertained. *Moreover, as the charter was a*

Massachusetts charter, and the constitution and by-laws were a part thereof, adopted in Massachusetts, having no other sanction than the laws of that state, it follows by the same token that those laws were integrally and necessarily the criterion to be resorted to for the purpose of ascertaining the significance of the constitution and by-laws. Indeed, the accuracy of this conclusion is irresistibly manifested by considering the intrinsic relation between each and all the members concerning their duty to pay assessments and the resulting indivisible unity between them in the fund from which their rights were to be enjoyed. The contradiction in terms is apparent which would rise from holding, on the one hand, that there was a collective and unified standard of duty and obligation on the part of the members themselves and the corporation, and saying, on the other hand, that the duty of members was to be tested isolatedly and individually by resorting not to one source of authority applicable to all, but by applying many divergent, variable, and conflicting criteria. In fact, their destructive effect has long since been recognized. *Gaines* v. *Supreme Council, R. A.*, 140 Fed. 978; *Supreme Council, R. A.* v. *Brashears*, 89 Md. 624, 73 Am. St. Rep. 244, 43 Atl. 866. *And from this it is certain that when reduced to their last analysis the contentions relied upon in effect destroy the rights which they are advanced to support, since an assessment which was one thing in one state and another in another, and a fund which was distributed by one rule in one state and by a different rule somewhere else, would in practical effect amount to no assessment and no substantial sum to be distributed.*

* * *

"In addition it was by the application of the same principle that a line of decisions in this court came to establish: first, *that the law of the state by which*

a corporation is created governs in enforcing the liability of a stockholder as a member of such corporation to pay the stock subscription which he agreed to make; second, *that the state law and proceedings are binding as to the ascertaining of the fact of insolvency and of the amount due the creditors entitled to be paid from the subscription when collected;* and third, that putting out of view the right of the person against whom a liability for a stockholder's subscription is asserted to show that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which at law or equity he is entitled to set off against the corporation, or has any other defense personal to himself, a decree against the corporation in a suit brought against it under the state law for the purpose of ascertaining its insolvency, compelling its liquidation, collecting sums due by stockholders for subscriptions to stock and paying the debts of the corporation, in so far as it determines these general matters, binds the stockholder, although he be not a party in a personal sense, because by virtue of his subscription to stock there was conferred on the corporation the authority to stand in judgment for the subscriber as to such general questions. *Selig* v. *Hamilton,* 234 U. S. 652, 58 L. Ed. 1518, 34 Sup. Ct. Rep. 926; *Converse* v. *Hamilton,* 224 U. S. 243, 56 L. Ed. 749, 32 Sup. Ct. Rep. 415; *Bernheimer* v. *Converse,* 206 U. S. 516, 51 L. Ed. 1163, 27 Sup. Ct. Rep. 755; *Whitman* v. *National Bank,* 176 U. S. 559, 44 L. Ed. 587, 20 Sup. Ct. Rep. 477; *Hawkins* v. *Glenn,* 131 U. S. 319, 33 L. Ed. 184, 9 Sup. Ct. Rep. 739. . . .

"*The controlling effect of the law of Massachusetts being thus established and the error committed by the court below in declining to give effect to that law and in thereby disregarding the demands of the full faith and credit clause being determined,* we

come to consider whether the increase of assessment which was complained of was within the powers granted by the Massachusetts charter, or conflicted with the laws of that state. Before doing so, however, we observe that the settled principles which we have applied in determining whether the controversy was governed by the Massachusetts law clearly make manifest how inseparably what constitutes the giving of full faith and credit to the Massachusetts judgment is involved in the consideration of the application of the laws of that state, and therefore, as we have previously stated, *how necessarily the express assertion of the existence of a right under the Constitution of the United States to full faith and credit as to the judgment was the exact equivalent of the assertion of a claim of right under the Constitution of the United States to the application of the laws of the state of Massachusetts. We say this because, if the laws of Massachusetts were not applicable, the full faith and credit due to the judgment would require only its enforcement to the extent that it constituted the thing adjudged as between the parties to the record in the ordinary sense, and on the other hand, if the Massachusetts law applies, the full faith and credit due to the judgment additionally exacts that the right of the corporation to stand in judgment as to all members as to controversies concerning the power and duty to levy assessments must be recognized, the duty to give effect to the judgment in such case being substantially the same as the duty to enforce the judgment.* • • •

"Coming, then, *to give full faith and credit to the Massachusetts charter of the corporation and to the laws of that state to determine the powers of the corporation and the rights and duties of its members,* there is no room for doubt that the amendment to the by-laws was valid if we accept, as we do, the

significance of the charter and of the Massachusetts law applicable to it as announced by the supreme judicial court of Massachusetts in the Reynolds Case. And this conclusion does not require us to consider whether the judgment *per se* as between the parties was not conclusive in view of the fact that the corporation, for the purposes of the controversy as to assessments, was the representative of the members. (See *Hartford L. Ins. Co.* v. *Ibs*, this day decided (237 U. S. 662, 35 Sup. Ct. Rep. 692).) Into that subject, therefore, we do not enter" (237 U. S., p. 531). (Italics ours.)

In the subsequent case of *Modern Woodmen of America* v. *Mix*, 237 U. S. 544, the beneficiary of a certificate issued by the fraternal society brought an action to recover because of the disappearance of the insured for more than ten years. The society was incorporated in Illinois, the certificate issued in South Dakota, and the action instituted in Nebraska. After the certificate had been issued, the by-laws of the society were amended to prohibit collection under certificates, even after long absence of the member, until the full term of the member's expectancy of life had expired. In Illinois the validity of the amendment was sustained (296 Ill. 104). The Nebraska court held that this amendment was unreasonable, and allowed recovery (111 Neb. 334). In reversing, this Court, in an opinion written by Mr. Justice HOLMES, said:

"The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced, and the consequence that their rights must be determined by a single law, is elaborated in *Supreme Council, R. A.* v. *Green*, 237 U. S. 531, 542, 59 L. Ed. 1089, 1100,

L. R. A. 1916A, 771, 35 Sup. Ct. Rep. 724. *The act of becoming a member is something more than a contract,—it is entering into a complex and abiding relation,—and as marriage looks to domicile, membership looks to and must be governed by the law of the state granting the incorporation.* * * * It does not matter that the member joined in another state. In the above cited case Green became a member of a Massachusetts corporation in New York, and the state court held on ordinary principles of contract that his rights were governed by New York law. *Green* v. *Supreme Council, R. A.*, 206 N. Y. 591, 597, 100 N. E. 411. But the decision was reversed, and *it was held a failure to give full faith and credit to the Massachusetts charter as construed by the Massachusetts court that Green was relieved by decree from paying assessments increased by the corporation after his contract was made.* We are of opinion that the decision in that case governs this, and that the judgment must be reversed." (Italics ours.)

The decisions of this Court in *Whitman* v. *National Bank of Oxford*, 176 U. S. 559 and *Hancock* v. *Farnum*, 176 U. S. 640, decided in 1900, are of particular significance in relation to Section 94B of the New Jersey Corporation Act here involved and enacted in 1897. Both involved the right to recover additional liabilities of stockholders of Kansas corporations under the provisions of Article XII, Section 2, of the Constitution of Kansas of 1859 and the General Statutes of Kansas of 1868, Chapter 23, Section 32, *et seq.* Under the Kansas Constitution, stockholders of Kansas corporations other than railroad, religious or chartible corporations were made personally liable to creditors of such corporations to an amount equal to the par value of their stock. Section 32 of the Kansas Statutes of 1862 pro-

vided that if upon the levy of any execution upon a judgment against any such corporation there cannot be found property upon which to levy, then the creditor "may proceed by action to charge the stockholders with the amount of his judgment." Attempts to enforce this liability met with great resistance in jurisdictions other than Kansas (*Marshall* v. *Sherman*, 148 N. Y. 9; *New Haven Horse Co.* v. *Linden Spring Co.*, 142 Mass. 349; *Post* v. *R. R. Co.*, 144 Mass. 341; *Bank of North America* v. *Rindge*, 154 Mass. 203; *Fowler* v. *Lamson*, 146 Ill. 472. See also *May* v. *Black*, 77 Wisc. 101; *Nimick* v. *Mingo Iron Works Co.*, 25 W. Va. 184; *Hancock National Bank* v. *Farnum*, 20 R. I. 466; *Rice* v. *Merrimack Hosiery Co.*, 56 N. H. 114). In *Marshall* v. *Sherman*, 148 N. Y. 9, decided in 1895, it was held that a Kansas statute providing for enforcement of the assessment for the benefit of a single creditor and against a single stockholder, who is thereby subjected to liability to the full par value of his stock without prior ascertainment by accounting or otherwise in the original jurisdiction of his pro rata liability was unreasonable and oppressive and would not be recognized in New York.*

In 1897, the supplement to the New Jersey Corporation Act, the validity of which is here involved, was enacted (*supra*, p. 7). It was evidently the purpose of this sec-

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* The views expressed in *Marshall* v. *Sherman*, 148 N. Y. 9, are largely modified by the subsequent decision in New York of *Howarth* v. *Angle*, 162 N. Y. 179, and New York recognizes and permits enforcement of assessments levied under the laws of other states [*Shipman* v. *Treadwell*, 200 N. Y. 472; *Royal Trust Co.* v. *Harding*, 155 App. Div. (N. Y.) 104; *Stratton* v. *Bertles*, 238 App. Div. (N. Y.) 87, 263 N. Y. Supp. 466; *Pacific Co.* v. *Opolinsky*, 135 Misc. (N. Y.) 265; *Union Guardian Trust Co.* v. *Broadway National Bank*, 138 Misc. (N. Y.) 16; *Matter of Gordon*, 149 Misc. (N. Y.) 765, 269 N. Y. Supp. 235].

tion to p vent creditors of insolvent Kansas corporations or creditors of corporations of other states having similar statutory provisions from pursuing stockholders of such corporations residing in New Jersey, and who otherwise might, under the Kansas statutes, be compelled to bear the entire burden of the insolvency or seek contribution from their co-stockholders residing in other jurisdictions. Litigation in New Jersey under the Kansas statutes is shown by the decision of *Western National Bank* v. *Reckless*, 96 Fed. 70 (D. C. N. J., 1899). There the Court held that since the New Jersey statute was enacted subsequent to the creation of the indebtedness in favor of the particular plaintiff, it did not apply, and that therefore the creditor of the Kansas corporation could sue at law in the Federal Court of New Jersey and obtain judgment pursuant to the Kansas statutes. In this opinion it was also intimated that if Section 94b were construed so as to apply to debts already contracted, it would violate that provision of the United States Constitution which prohibits states from impairing the obligations of contracts. It would thus appear that the New Jersey statute was not intended to apply to enforcement of assessments by public officers acting in a fiduciary capacity for the benefit of all creditors after due ascertainment of the deficiency, and who are enjoined by provisions similar to those of Sections 80 and 120 of the New York Banking Law to levy and enforce such assessments equally and ratably against the stockholders. This was urged below and rejected by the New Jersey courts. This resume of the history and background of Section 94b is, however, of importance, since Section 94b embodies in statutory form the basic views expressed in the Rhode Island decision of *Hancock National Bank* v. *Farnum*, 20 R. I. 466, and the

contentions of the appellants in *Whitman* v. *National Bank of Oxford,* 176 U. S. 559, and which were rejected by this Court under the full faith and credit clause of the United States Constitution.

Thus, *Whitman* v. *National Bank of Oxford,* 176 U. S. 559, was an action by the National Bank of Oxford against Whitman, a citizen of New York, instituted in the Federal Court for the Southern District of New York, upon an indebtedness of $2,000 due from the City Investment Corporation, a Kansas corporation of which the defendant was a stockholder. Judgment was awarded the plaintiff in the District Court and was affirmed in the Circuit Court of Appeals, and on a writ of certiorari the case came before this Court. Counsel for the appellant stressed the decision of *Marshall* v. *Sherman,* 148 N. Y. 9, and contended that the liability was purely statutory, was peculiar to Kansas, and that therefore the remedy provided by the Kansas statute under which a single judgment creditor could pursue a single stockholder for satisfaction of his unpaid judgment was not available in jurisdictions other than Kansas (p. 562). In rejecting this contention and sustaining the judgment of the Court below, this Court said:

> "Whatever else may be said about the remedy, it is direct, certain, and available to every creditor of a corporation, and leaves to the stockholders the adjustment between themselves of their respective individual shares of the corporate obligations. In view of the present tendency to carry on business through corporate instrumentalities and the freedom from personal liability which attends ordinary corporate action, it cannot be said that this limited additional remedy is open to judicial condemnation.

> "The liability which by the Constitution and statutes is thus declared to rest upon the stockholder, though statutory in its origin, is contractual in its nature. It would not be doubted that if the stockholders in this corporation had formed a partnership, the obligations of each partner to the others and to creditors would be contractual, and determined by the general common law in respect to partnerships. If Kansas had provided for partnerships with limited liability, and these parties, complying with the provisions of the statute, had formed such a partnership, it would also be true that their obligations to one another and to creditors would be contractual, although only in the statute was to be found the authority for the creation of such obligations. And it is none the less so when these same stockholders organized a corporation under a law of Kansas, which prescribed the nature of the obligations which each thereby assumes to the others and to the creditors. While the statute of Kansas permitted the forming of the corporation under certain conditions, the action of these parties was purely voluntary. In other words, they entered into a contract authorized by statute."

Hancock National Bank v. *Farnum*, 176 U. S. 640, was also an action by a creditor of an insolvent Kansas corporation, against a stockholder residing in Rhode Island. The Rhode Island court sustained a judgment of the court of original jurisdiction, entered upon motion, dismissing the complaint (20 R. I. 466). Plaintiff thereupon sued out a writ of error to this Court. In reversing the decision and remanding the case for further proceedings to the Rhode Island court, this Court held:

> "It remains to be determined whether the action of the supreme court of Rhode Island in failing to

recognize the right which, in the case just referred to, we have held that the plaintiff possessed, is one which can be revised by this proceeding in error. In order to give this court jurisdiction of a case decided in the courts of a state there must be some question arising under the Constitution of the United States; some alleged denial of a right or immunity secured by that Constitution. The plaintiff says that the decision of the supreme court of Rhode Island denied it a right given by §1, article 4, of the Constitution of the United States, which reads: 'Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof,' and the following statute passed in pursuance thereof, to wit, Revised Statutes, §905.

"'The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.'

"The plaintiff's contention that these Federal provisions required a decision different from that

made by the state court was distinctly presented and ruled against. The jurisdiction, therefore, of this court, is clear. * * *"

"The Constitution declares that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and that Congress may not only prescribe the mode of authentication, but also the effect thereof. Section 905 prescribes such mode, and adds that the 'records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United Sattes as they have by law or usage in the courts of the state from which they are taken.' Such is the congressional declaration of the effect to be given to the records and judicial proceedings of one state in the courts of every other state. *In other words, the local effect must be recognized everywhere through the United States.*"

* * * * * *

"Now, as the judgment rendered in the Kansas court is in that state not only conclusive against the corporation, but also binding upon the stockholder, it must, in order to have the same force and effect in other states of the Union, be adjudged in their courts to be binding upon him, and the only defenses which he can make against it are those which he could make in the courts of Kansas. *The question to be determined in this case was not what credit and effect are given in an action against a stockholder in the courts of Rhode Island to a judgment in those courts against the corporation of which he is a stockholder, but what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered. Thus and thus only can the full faith and credit prescribed by the Constitu-*

tion of the United States and the act of Congress be secured.'' (Italics ours.)

The Kansas *statutes* provided that an unsatisfied judgment against the corporation gives rise to a cause of action against any stockholder of the corporation to compel payment of the judgment. This decision required that Rhode Island give full faith and credit to the Kansas *statutes* by according to the judgment recovered against the corporation the same force and effect in Rhode Island as that provided for under the Kansas statutes. Rhode Island was not therefore compelled to give full faith and credit to a judgment entered in Kansas against the Rhode Island stockholder of the Kansas corporation, as appellees contended below, but to accord to the judgment against the corporation that force and effect declared by the statutes of the state of Kansas (*Royal Arcanum* v. *Green, supra; Modern Woodmen of America* v. *Mixer, supra*). Under the Kansas *statute,* as we have already shown, the judgment creditor was given a cause of action against any stockholder to obtain satisfaction of his unpaid judgment. This Court said that "• • • the local effect"—in other words, the effect of a judgment against a Kansas corporation in Kansas and under the Kansas statutes—"must be recognized everywhere throughout the United States. • • • Thus and thus only," this Court held, "can the full faith and credit prescribed by the Constitution of the United States and the act of Congress be secured." *Hancock* v. *Farnum* is authority, therefore, not only for the proposition that all states must permit enforcement of additional stockholders' liabilities created by the laws of other states, but also that the effect of the statutory provisions of Kansas establishing the liability of the stockholder and declaring

the circumstances and conditions under which such liability shall arise must be applied and given full faith and credit in any action or proceeding instituted by the creditor in a foreign state. It is equally apparent that Section 94b of the New Jersey Corporation Act under consideration here, applied to the situation presented in *Hancock* v. *Farnum, supra,* would deprive the Kansas statutes of that full faith and credit required under the United States Constitution and the decision by this Court of *Hancock* v. *Farnum.*

Thereafter, *Hale* v. *Allinson,* 188 U. S. 56, and *Finney* v. *Guy,* 189 U. S. 335, relied upon below by appellees, and involving extra-territorial enforcement of assessments provided by Minnesota statutes, were decided by this Court. These decisions sustained the denial of the right to enforce the assessment in jurisdictions other than Minnesota, but solely on the ground that the receivers had no title to or right to enforce the assessment in Minnesota under the Minnesota law, and therefore could have no greater right to enforce the assessment in any other jurisdiction.

Subsequently and by General Laws of Minnesota of 1899, Chapter 272, receivers or creditors of insolvent Minnesota corporations were authorized to petition the Minnesota court for a determination of whether an assessment was necessary. The Minnesota court was authorized to give such notice of the hearing as it deemed proper in its discretion. The statute then provided that upon the hearing the court could take evidence, by affidavit or otherwise, of the insolvency of the corporation and fix the liability of its stockholders for an assessment. After ascertaining the amount of the assessment chargeable against stockholders, the court was directed to order the receiver to demand payment of such assessment, and upon failure of

the stockholders to pay, to institute action in Minnesota or any other jurisdiction for its enforcement. Section 5 of the Minnesota statutes above referred to, which is set forth in *Bernheimer* v. *Converse*, 206 U. S. 516, and *First National Bank* v. *Converse*, 200 U. S. 424, at page 428, provided:

> "Sec. 5. *Said order and the assessment thereby levied shall be conclusive upon and against all parties liable upon or on account of any stock* or shares of said corporation, *whether appearing or represented at said hearing, or having notice thereof or not*, as to all matters relating to the amount of and the propriety of and necessity for the said assessment. This provision shall also apply to any subsequent assessment levied by said court as hereinafter provided." (Italics ours.)

Referring to this statutory procedure for ascertaining and determining whether an assessment was necessary, Mr. Justice CLARKE, in a dissenting opinion in *Marin* v. *Augedahl*, 247 U. S. 142, discussed numerous Minnesota decisions and pointed out:

> "The order was entered in a special statutory proceeding of a character such that the supreme court of Minnesota has declared that it is intended to be '*summary and without formal pleadings* and not controlled by all the forms usually incident to judicial procedure,' Finch, Van Slyck, & McConville & Vanasek, 132 Minn. 9, 12, 155 N. W. 754. The hearing in such cases is upon 'such notice as it (the court) deems proper' by publication or otherwise to be given; upon the hearing the court 'shall receive and consider such evidence *by affidavit or otherwise* as may be presented by the receiver, or by any

creditor, officer, or stockholder appearing in person or by attorney;' and the statute expressly provides that:

"'Such order shall be conclusive as to all matters relating to the *amount, propriety, and necessity* of the assessment, against all parties therein adjudged liable upon, or on account of, any stock or shares of such corporation, whether appearing or being represented at the hearing or not, or having notice thereof or not.' Minn. Gen. Laws 1899, chap. 272.

"That the conclusive character of the order entered in such a proceeding has been strictly confined by the Minnesota supreme court to the respects in which the statute just quoted declares it shall be conclusive, leaving all other defenses open to the stockholder, is shown by the following decisions:

"The act in force when the order now under discussion was entered was passed in 1899, and in the following year the supreme court of Minnesota sustained its constitutionality in Straw & E. Mfg. Co. *v.* L. D. Kilbourne Boot & Shoe Co., 80 Minn. 125, 83 N. W. 36, a case cited with approval by this court in both the *Bernheimer* case, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755, and *Converse* case, 224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415, Ann. Cas. 1913D, 1292. It was there held as follows:

"'Although the court inquires into the amount of the liabilities as well as to what will probably be realized out of the assets, *its sole determination is* that it is necessary and proper that an assessment of a given amount shall be levied against each share of stock. *That, and that only, is the ultimate issuable fact to be found by the court.*

"'The plain purport of §§3 and 5 is that after an order of assessment has been duly made, and the

receiver has sued an alleged stockholder to recover upon the assessment, the order cannot be attacked in that action upon the ground that the assessment was unnecessary or excessive, or upon the ground that the defendant was not actually a party to, or personally notified of, the hearing upon which the assessment was made. . . .

"'But, as we have heretofore intimated, the stockholders are not concluded in all respects by the determination of the court, nor is that the fair meaning of chapter 272, §5. A person sued as *a shareholder may show,* if he can, *that he is not a shareholder at all, or that he is not the holder of so large an amount of stock as is alleged,* or that he has discharged his liability, or that he has a claim against the corporation which he may, in law or equity, set off against the claim or judgment in assessment, *or he may make any other defense which is personal to himself.*'

"Again, in its latest construction of the act, in 1916, in Finch, Van Slyck & McConville *v.* Vanasek, *supra,* the court uses this language:

"'It was intended by the statute that the proceeding should be summary and without formal pleadings, and it is not controlled by all the forms usually incident to judicial procedure. *The court* under the statute deals in the main with probabilities, and *is not authorized to determine any fact, other than that of insolvency and the amount of the assessment to be made,* which in any way precludes the stockholders in a subsequent action brought to enforce the assessment. *The assessment is but preliminary to such an action, and therein the stockholders may present all matters that may be available to them in defense.* Straw & E. Mfg. Co. *v.* L. D. Kilbourne Boot & Shoe Co., *supra*'" (pp. 158, *et seq*).

This discussion of the character of the Minnesota proceeding does not conflict with the majority opinion, where it is pointed out that "*Besides* being a court of general jurisdiction, both at law and in equity, the court making the order had full jurisdiction of that suit" (p. 146).

Bernheimer v. *Converse*, 206 U. S. 516, was an action by a receiver of an insolvent Minnesota corporation appointed pursuant to the revision of 1888 above referred to against various stockholders of the insolvent Minnesota Thresher Mfg. Company residing in New York. Judgment was entered against the stockholders who sued out a writ of error to this Court. The stockholders contended that when they originally acquired their stock the laws of 1888 had not as yet been enacted and that under the prior Minnesota statutes, as interpreted in *Finney* v. *Guy* and *Hale* v. *Allinson*, above referred to, actions to enforce the assessment could be brought only by way of a bill in equity in Minnesota and not by a receiver in any other jurisdiction. The stockholders contended that in providing the new method of enforcing the assessment the Minnesota statute increased their contractual obligation as stockholders and was therefore invalid under the Constitution of the United States prohibiting the impairment of contracts. The stockholders also contended that the statute was unconstitutional in that it provided for a final and conclusive determination of the necessity of the assessment against stockholders residing in states other than Minnesota and over whom the Minnesota Court could obtain no jurisdiction. In overruling these contentions and sustaining the judgment below, this Court, in an opinion written by Mr. Justice Day, first pointed out:

> "It may be regarded as settled that, upon acquiring stock, the stockholder incurred an obligation

> arising from the constitutional provision, contractual in its nature, and, as such, capable of being enforced in the courts not only of that state, but of another state and of the United States (Whitman *v.* National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477), * * *"

The Court then proceeded to dispose of the objections of the defendant stockholders as follows:

> "It is said that the stockholder is held liable in a proceeding to which he is not a party. Under the prior act he could only be held where service could be had upon him personally, but, if we are right in the proposition just announced, that additional remedies may be provided by legislation, then the validity of such additional enactments depends not necessarily upon the personal service upon the stockholders, *but upon the fact whether the remedy provided is a well-recognized means of enforcing such obligations, and not in violation of constitutional rights.* It is true that the stockholder is not necessarily served with process in the action wherein the assessment is made under the act of 1899, but no personal judgment is rendered against him in that proceeding, and it has reference to a corporation of which he is a member by virtue of his holding stock therein, and the proceeding has for its purpose the liquidation of the affairs of the corporation, the collection and application of its assets and other liabilities which may be administered for the benefit of creditors. In such case it has been frequently held that the representation which a stockholder has by virtue of his membership in the corporation is all that he is entitled to. It was so held in a well-considered case in Massachusetts (Howart *v.* Lombard, 175 Mass. 570, 49 L. R. A. 301, 56 N. E.

888). And it has been held in cases in this court that when an assessment is necessary to be made upon unpaid stock subscriptions for the benefit of creditors, the court may make the assessment without the presence or personal service of stockholders. Hawkins *v.* Glenn, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; Great Western Teleg. Co. *v.* Purdy, 162 U. S. 329, 336, 40 L. ed. 986, 990, 16 Sup. Ct. Rep. 810."

* * * * * *

"It is sought to distinguish between the Massachussets case of Howarth *v.* Lombard, *supra*, and kindred cases, and the one at bar, in the fact that when the stock was acquired in that case a statutory provision was already in existence which made the stockholder liable to an assessment in a proceeding in which the stockholder was represented by the corporation. *But, as we have said, keeping within the constitutional measure of liability, it was within the power of the legislature of Minnesota to make provisions, within the limits of due process of law, for the liquidation of the affairs of the corporation in a proceeding in the state of its origin, wherein members of the corporation should be sufficiently represented by the presence of the corporation itself. This practice has the sanction of the courts, as we have already shown. It is substantially the procedure authorized by the national banking act, except that the Comptroller of the Currency takes the place of the court, and, without the presence of the stockholders, makes a conclusive assessment. We cannot find any constitutional right belonging to the stockholder which is violated by this change in the character and nature of the remedy against him.*

"By becoming a member of a Minnesota corporation, and assuming the liability attaching to such

> *membership, he became subject to such regulations as the state might lawfully make to render the liability effectual.*" (Italics ours.)

The next case of interest is *Converse* v. *Aetna National Bank*, 212 U. S. 565. That was an action by the receiver of the same insolvent Minnesota corporation involved in *Bernheimer* v. *Converse, supra*, against various stockholders residing in Connecticut. The Connecticut Court sustained a judgment dismissing the complaint (79 Conn. 603) on the ground that the proceedings in Minnesota were not conclusive upon stockholders residing in Connecticut and on the further ground that the Minnesota statute was invalid under the Federal Constitution as impairing the obligation of contracts. The following is the complete *Per Curiam* opinion of this Court:

> "Judgments reversed with costs, on the authority of Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755, and cases remanded for further proceedings in conformity to law."

Thereafter, *Converse* v. *Hamilton*, 224 U. S. 243, came before this Court upon writ of error to the Supreme Court of the State of Wisconsin. That was also an action by the receiver of the same insolvent Minnesota corporation involved in *Bernheimer* v. *Converse, supra*, against various of its stockholders residing in Wisconsin. The Wisconsin Court entered judgment dismissing the complaint (136 Wisc. 589; 136 Wisc. 594). It is interesting to note that in the dissenting opinion in *Converse* v. *Hamilton*, 136 Wisc. 589, the dissenting Justice pointed out that a statute effecting a result identical with that reached by the Court would undoubtedly be unconstitutional under the full faith and credit clause of the United States Constitution.

In reversing the judgment of the Wisconsin Court and remanding the case for further proceedings, the Court first pointed out:

> "Of course, we must look to the Minnesota Constitution, statutes, and decisions to determine the nature and extent of the liability in question, and the effect given in that state to the laws and judicial proceedings therein looking to its enforcement, * * *."

The Court then reviewed the Minnesota statutes already referred to extensively, *supra*, and held:

> "The constitutional validity of chapter 272 has been sustained by the supreme court of the state, as also by this court; and this because (1) the statute is but a reasonable regulation of the mode and means of enforcing the double liability assumed by those who become stockholders in a Minnesota corporation; (2) while the order levying the assessment is made conclusive, as against all stockholders, of all matters relating to the amount and propriety of the assessment and the necessity therefor, one against whom it is sought to be enforced is not precluded from showing that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which, in law or equity, he is entitled to set off against the assessment, or has any other defense personal to himself, and (3) while the order is made conclusive as against a stockholder, even although he may not have been a party to the suit in which it was made, and may not have been notified that an assessment was contemplated, this is not a tenable objection, for the order is not in the nature of a personal judgment against the stockholder, and as to him is amply sustained by

the presence in that suit of the corporation, considering his relation to it and his contractual obligation in respect of its debts. Straw & E. Mfg. Co. *v.* L. D. Kilbourne Boot & Shoe Co., *supra;* London & N. W. American Mortg. Co. *v.* St. Paul Park Improv. Co., 84 Minn. 144, 86 N. W. 872; Bernheimer *v.* Converse, *supra.*

"This statement of the nature of the liability in question, of the laws of Minnesota bearing upon its enforcement, and of the effect which judicial proceedings under those laws have in that state, discloses, as we think, that in the cases now before us the supreme court of Wisconsin failed to give full faith and credit to those laws and to the proceedings thereunder, upon which the receiver's right to sue was grounded."

* * * * * *

"True, the full faith and credit clause of the Constitution is not without well-recognized exceptions, as is pointed out in Huntington *v.* Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Andrews *v.* Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237, and National Exch. Bank *v.* Wiley, 195 U. S. 257, 49 L. ed. 184, 25 Sup. Ct. Rep. 70; but the laws and proceedings relied upon here come within the general rule which that clause establishes, and not within any exception. Thus, the liability to which they relate is contractual, not penal. The proceedings were had with adequate jurisdiction to make them binding upon the stockholders in the particulars before named. *The subject to which chapter 272 is addressed is peculiarly within the regulatory power of the state of Minnesota; so much so that no other state properly can be said to have any public policy thereon.* And what the law of Wisconsin may be respecting the relative rights and obligations of credi-

tors and stockholders of corporations of its creation, and the mode and means of enforcing them, is apart from the question under consideration.

"In these circumstances we think the conclusion is unavoidable that the laws of Minnesota and the judicial proceedings in that state, upon which the receiver's title, authority, and right to relief were grounded, and by which the stockholders were bound, were not accorded that faith and credit to which they were entitled under the Constitution and laws of the United States." (Italics ours.)

The next case of importance upon the question at issue is *Selig* v. *Hamilton*, 234 U. S. 652, also arising under the Minnesota assessment statutes. In that case the defendant had transferred his stock some time prior in September, 1904, whereas the corporation was not declared insolvent until September of 1905. The defendant contended that the proceedings taken in Minnesota to ascertain the deficiency did not bind him since they applied only to persons who were stockholders when insolvency intervened. In overruling this contention the Court, in an opinion by Mr. Justice HUGHES, pointed out that under the Minnesota statute stockholders remain liable, even though they have transferred their stock, for all debts contracted while they were stockholders and unpaid when insolvency intervened. The Court pointed out that the petition filed in the Minnesota proceedings and the order entered thereon covered the liability of the defendant, and held:

"It follows that if the court, thus having jurisdiction, and acting upon the evidence before it in the statutory proceeding, assessed former stockholders for the purpose of providing for debts incurred while they held their stock, its determination

with respect to the amount of the assessment and the necessity therefor must be deemed conclusive. These questions cannot be reopened in another court when the receiver sues to collect the amount of the assessment. The stockholder in such a suit is free to urge his personal defenses, but this does not mean that he may resist the receiver's demand upon the ground that the assessment was not needed. *The marshalling of the amounts recovered from stockholders is also the appropriate subject for the consideration of the court which, under the statute, collects and distributes the fund. It is quite obvious that another court, in an action by the receiver against the stockholder, could not undertake to fix the amount required to pay the debts for which the stockholder is liable unless it virtually assumed the duty imposed by the statute of determining what a ratable assessment should be, and thus denied due credit to the determination already made in a court of competent jurisdiction.*" (Italics ours.)

The Court concluded that if any error had been made in the order assessing the defendant, the only remedy for the defendant lay in an application to the Minnesota Court for its correction and not by way of collateral attack in other jurisdictions.

These Minnesota statutes again came before this Court in *Marin* v. *Augedahl*, 247 U. S. 142. That was an action at law in North Dakota by a receiver of an insolvent Minnesota corporation to enforce against one of its stockholders residing in North Dakota an order of the Minnesota Court levying an assessment. The North Dakota Court held that the corporation, of which defendant was a stockholder, came within the exceptions of the Minnesota statute with regard to corporations whose stockholders are liable for assess-

ments and dismissed the action. In reversing the North Dakota judgment, this Court held:

> "Under these circumstances, the order is entitled, under the Constitution and laws of the United States, to the same faith and credit in the courts of North Dakota as by law or usage are given to such an order in the courts of Minnesota. Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; Converse *v.* Hamilton, 224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415, Ann. Cas. 1913D, 1292. In Minnesota, as before said, it is conclusive of all matters relating to the propriety of the assessment, including the questions of the character and insolvency of the corporation, and therefore it should have been held similarly conclusive in North Dakota. The court of that state declined to regard it as determining the character of the corporation, and so failed to give it the faith and credit to which it is entitled."

Thus these decisions, like the decision of *Hancock* v. *Farnum, supra,* require states other than the state of incorporation not only to permit enforcement of assessment liabilities created by the laws of the state of incorporation, but also to recognize and give full force and effect to the statutory provisions of the state of incorporation for ascertaining and determining whether the assessment was necessary and the amount thereof. In each of these cases stockholders residing in states other than Minnesota contended that they could not be bound by the order of the Minnesota court, entered without personal service upon them, and which, under the Minnesota statutes, was made conclusive and binding upon them even though they had received no notice of the proceeding and had not appeared or been

represented at the hearing. But these contentions were consistently and repeatedly overruled.

In the court below, appellees construed these cases merely as a holding that courts of states other than the State of Minnesota were required to give full faith and credit to judicial proceedings in Minnesota. It was argued that this is different from the obligation to recognize and enforce an assessment levied by a public officer pursuant to the statutes of a different state. The attempted distinction is without merit. Obviously, if the extra-territorial force of the orders of the Minnesota court was predicated exclusively upon the application of the full faith and credit clause of the United States Constitution to judgments, the orders independent of the statutes upon which they were founded would have been invalid in jurisdictions other than Minnesota because of the absence of personal service in Minnesota upon the stockholders affected (*Pennoyer* v. *Neff*, 95 U. S. 714).

Indeed the order or decree of the Minnesota court was largely administrative in character. This is shown by the remarks of Mr. Justice Clarke in his dissenting opinion to *Marin* v. *Augedahl*, 247 U. S. 142, and quoted *supra*, page 57, and to like effect, see *Matter of Bank of Winslow*, 36 Ariz. 507, 287 Pac. 444. This is also recognized by the decisions of this Court in *Kennedy* v. *Gibson*, 75 U. S. 476; *Casey* v. *Galli*, 94 U. S. 673; *United States* v. *Knox*, 102 U. S. 422; *Bushnell* v. *Leland*, 164 U. S. 684; and *In re Chetwood*, 165 U. S. 443. In those cases it was contended by stockholders of national banks that the transfer of the power to suspend banks and determine the necessity of and levy assessments against national bank stockholders, formerly exercised by the courts as a so-called judicial

function, constituted an invalid delegation to an executive officer of powers judicial in nature. But in the decisions above referred to, this contention was specifically overruled. Thus, in *In re Chetwood,* 165 U. S. 443, this Court said:

> "It has been so often decided that the authority vested in the comptroller to appoint a receiver of a defaulting or insolvent national bank, or to call for a ratable assessment upon its stockholders is not open to objection because vesting that officer with judicial power in violation of the Constitution, that we have recently declined to re-examine that question."

The same view was taken by the New York courts in *Matter of Union Bank,* 176 App. Div. 477, 163 N. Y. Supp. 485.

In the final analysis, the *ex parte* order of the Minnesota court is identical with the quasi-judicial determination of the New York Superintendent of Banks and of the comptroller of currency to levy assessments. The right, in each case, is founded upon the jurisdiction of the state of incorporation over the corporate entity and the general power of the legislature to regulate and provide for the enforcement of liabilities of members of corporations organized under the laws of the respective jurisdiction. Finally, under *Royal Arcanum* v. *Green,* 237 U. S. 531, *supra,* p. 42, and *Modern Woodmen of America* v. *Mixer,* 267 U. S. 544, *supra,* p. 47, it is clear that in this situation the full faith and credit clause requires states other than the state of incorporation to recognize and give effect to the statutes of the state of incorporation which govern the rights and liabilities of stockholders.

D.

The requirement of Section 94b that the assessment may only be enforced through an accounting in an action initiated by a bill in equity denies to the determination by the New York Superintendent that conclusive effect which attaches to such determination under the laws of New York.

Section 94B of the New Jersey Corporation Act, the validity of which is involved upon this appeal and which was applied by the Court below in entering final judgment dismissing the complaint, provides as follows:

> "2. No action or proceeding shall be maintained in any court of law of this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, *if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country;* and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in a nature of an *equitable accounting* for the proportionate benefit of all parties interested, *to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties.*
>
> "3. This act shall take effect immediately. Approved March 30, 1897." (Italics ours. P. L. 1897, c. 50.)

Thus, Section 94b requires the Superintendent to institute an action in New Jersey in the nature of an "equitable accounting" for the proportionate benefit of all parties interested in order to recover the assessment from New Jersey stockholders of New York banks. The statute plainly requires the Superintendent to submit to the New Jersey Court an accounting of his stewardship of the assets of the bank, a statement of all of its liabilities and all of its assets and an appraisal of the reasonable value of such assets upon the basis of which the New Jersey Chancery Court may make an accounting for the purpose of ascertaining whether an assessment is necessary and the amount thereof; and this was the holding of the Court below.

The decisions by this Court in *Whitman* v. *National Bank of Oxford*, 176 U. S. 559 and *Hancock* v. *Farnum*, 176 U. S. 640, establish that Section 94b is violative of both the full faith and credit and due process clauses of the Constitution. Thus, in the cases above referred to, creditors of insolvent Kansas corporations were attempting to enforce in a foreign state a statutory liability of the stockholders of such corporations for its debts and liabilities.

In *Hancock* v. *Farnum, supra*, this Court held that the remedy provided under the Kansas statute by which a judgment creditor was given the right to seek payment of his unsatisfied judgment against any stockholder of the insolvent Kansas corporation was a clear right which must be recognized under the full faith and credit clause of the Constitution in other jurisdictions. Had a judgment creditor of an insolvent Kansas corporation sought to enforce his claim in New Jersey after the enactment of Section 94b in 1897, he would have been compelled to surrender his rights under the Kansas statute to pursue a single stock-

holder for his unpaid judgment and to institute an action for an equitable accounting in New Jersey for the proportionate benefit of all parties interested and to join as necessary parties the Kansas corporation and its legal representatives, if any, and all of its creditors and all of its stockholders. But this Court held in *Hancock* v. *Farnum* that all states must give the same force and effect to the right of creditors of insolvent Kansas corporations against their stockholders as is given in Kansas under the laws of Kansas. Under the express holding in that case the creditor of the Kansas corporation has the right to rely in New Jersey upon the conclusive effect of his judgment declared by the Kansas statute and to recover against any of the stockholders of the Kansas corporation residing in New Jersey. It is therefore clear that the decision of this Court in *Hancock* v. *Farnum* and the provisions of Section 94b of the New Jersey Corporation act are irreconcilable and the latter must yield.

Again, in *Bernheimer* v. *Converse*, 206 U. S. 516; *Converse* v. *Aetna National Bank*, 212 U. S. 565; *Converse* v. *Hamilton*, 224 U. S. 243; *Selig* v. *Hamilton*, 234 U. S. 652 and *Marin* v. *Augedahl*, 247 U. S. 142, this Court required other states to give full faith and credit to *ex parte* orders of Minnesota courts levying assessments against stockholders of insolvent Minnesota corporations, which orders were, under Minnesota statutes, binding and conclusive upon all stockholders whether resident or non-resident. Had the receivers in those cases commenced actions against stockholders residing in New Jersey, Section 94b, if valid, would require abandonment of the order of the Minnesota court and the institution of a new accounting proceeding in New Jersey, to which the Minnesota corporations and all of its

creditors and stockholders would be necessary parties, for a re-ascertainment of the necessity of the assessment. Obviously, the decisions of this Court above referred to and the provisions of Section 94b are in direct conflict.

Thus Section 94b nullifies the official determination of the necessity of the assessment made by the Superintendent of Banks pursuant to Section 80 of the Banking Law. Under Section 94b, he is required to commence an equitable proceeding in New Jersey for the purpose of obtaining a judicial re-ascertainment upon the question of whether the assessment is necessary and, if so, the amount thereof. Just as in the situations presented in *Hancock* v. *Farnum*, 176 U. S. 640, and in *Converse* v. *Hamilton*, 224 U. S. 243, the decisions of the State Courts deprived the statute in the state of the domicile of the corporation of full faith and credit, so Section 94b deprives the New York statutes and the public act of the New York Superintendent of Banks pursuant thereto, of the full faith and credit to which they are entitled under the United States Constitution.

E.

The conditions imposed by Section 94b upon the enforcement of such assessment constitute a denial of the right of the Superintendent to resort to the Courts of the State of New Jersey to recover upon the assessment liability of stockholders of New York banks residing in New Jersey and thus violates the full faith and credit and due process clauses of the United States Constitution (Constitution, Art. IV, §1, XIVth Amendment).

Under Section 94b, the Superintendent may recover upon the assessment in New Jersey only in an action for an equitable accounting "to which such corporation and

its legal representatives, if any, and *all of its creditors* and *all of its stockholders* shall be *necessary* parties." Under this statute, the Superintendent is required to join as a party defendant a New York banking corporation which never conducted business in New Jersey, more than 400,000 depositors and creditors of The Bank of United States, residing in almost every state throughout the Union and in foreign countries (*Comp.*, par. 5, R., p. 5), and an additional 20,000 stockholders of The Bank of United States all of whom are non-residents of New Jersey (*Comp.*, par. 2, R., p. 3). These persons are, under the statute, "necessary parties" to the action. Obviously, it is impossible to effect personal service of the summons and complaint in New Jersey upon the vast bulk of these necessary parties. It is equally obvious that jurisdiction cannot be obtained in New Jersey over the stockholders and creditors of The Bank of United States who never resided in or owned any property in New Jersey. The foundations of jurisdiction are familiar and well-settled, and all attempts to effect service upon non-residents not conducting business or owning property in New Jersey through the medium of publication or other forms of substituted service, have been repeatedly rejected by the New Jersey courts and by this Court (*Pennoyer* v. *Neff*, 95 U. S. 714; *Wilson* vs. *Am. Palace Car Co.*, 65 N. J. Eq. 730; *Sielcken* v. *Sorenson*, 109 N. J. Eq. 397; *Papp* v. *Metropolitan Life Ins. Co.*, 113 N. J. Eq. 522; *Puster* v. *Parker Mercantile Co.*, 70 N. J. Eq. 771; *Cameron* v. *Penn Mutual Life Ins Co.*, 111 N. J. Eq. 24; *Lanning* v. *Twining*, 71 N. J. Eq. 573; *Fraxam, etc. Corp.* v. *Skouras, etc. Corp.*, 113 N. J. Eq. 512). The term "necessary parties" defines those parties whose presence in an action is essential as a jurisdictional

prerequisite to the entry of judgment (*Wilkinson* v. *Dodd*, 40 N. J. Eq. (13 Stew.), 123; *In re Martin*, 86 N. J. Eq. 265; *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33; *Ex parte Equitable Trust Co.*, 231 Fed. 571; U. S. v. *Allen*, 179 Fed. 13; *Leonard* v. *Pierce*, 182 N. Y. 431; *Mahoney* v. *Bernhardt*, 27 N. Y. Misc. 339; *Phoenix National Bank* v. *Cleveland Co.*, 58 Hun (N. Y.) 606; *Jones* v. *Bryant*, 204 Ill. App. 609; *Chandler* v. *Ward*, 188 Ill. 322; *Tatum* v. *Roberts*, 59 Minn. 52; *Hyams* v. *Dominion Co.*, 113 Me. 337; *Rosina* v. *Trowbridge*, 20 Nev. 105; *Sexton* v. *Sutherland*, 37 N. D. 500; *State* v. *Municipal Savings and Loan Co.*, 111 Ohio St. 178; *Burrell* v. *Garst*, 19 R. I. 38). In *Wilkinson* v. *Dodd*, 40 N. J. Eq. (13 Stew.) 123, the Court quoted with approval the following definition of necessary parties appearing in *Bailey* v. *Inglee*, 2 Paige 278:

> "• • • 'Persons are necessary parties when no decree can be made respecting the subject matter of litigation until they are before the court • • •'" (p. 130).

Thus, Section 94b prohibits and precludes enforcement of the assessment in New Jersey (*Hancock* v. *Farnum*, 176 U. S. 640; *Whitman* v. *National Bank of Oxford*, 176 U. S. 559, *Bernheimer* v. *Converse*, 206 U. S. 516, *Converse* v. *Aetna National Bank*, 212 U. S. 565, *Converse* v. *Hamilton*, 224 U. S. 243, *Selig* v. *Hamilton*, 234 U. S. 652, *Marin* v. *Augedahl*, 247 U. S. 142, *Royal Arcanum* v. *Green*, 237 U. S. 531, and *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544).

Even assuming that under Section 94b it is not necessary to effect personal service upon or obtain jurisdiction

in New Jersey over the some 400,000 non-resident depositors and creditors and 20,000 non-resident stockholders of The Bank of United States and that substituted service would suffice, the statute remains arbitrary and unreasonable, and therefore unconstitutional. It would still remain necessary under the statute to name these non-resident depositors and creditors and stockholders as parties to the action. We have not precisely calculated the expense of printing a document of the encyclopedic proportions required by the statute, but it would obviously be tremendous. It would also be necessary to effect personal service upon every creditor and depositor of the bank residing in New Jersey. The Sheriff would have to return process *non est inventus* as to each non-resident defendant. Chapter 88, P. L. of New Jersey, 1922, page 164, entitles the Sheriff to a fee of $1.50 for making an affidavit of non-residence of a defendant. In the present case this fee would aggregate over $600,000, or more than the amount involved in this suit. The Superintendent would then be compelled to make applications for leave to effect substituted service on all of such defendants, approximately 420,000 in number, and present the essential facts showing the necessity therefor. This would require in addition to the return of the Sheriff an affidavit setting forth the residence or place of business of each defendant (N. J. Chancery Rules, 36-38). It is impossible rationally to conceive of compliance with such conditions or to calculate the expense and difficulties of offering such evidence. In addition to the fees of the Sheriff the expense of mailing is to some extent indicated by the fact that a three-cent stamp alone on 420,000 notices would cost some $12,600. This represents an insignificant item compared with the expense entailed in printing such notices,

typing names and addresses of the some 420,000 persons to whom they would have to be mailed, and effecting their mailing. Again, assuming that a direction for the publication of the notice was made by the New Jersey courts we have reasonably calculated that the printed names of the 420,000 non-resident defendants would fill at least eighty newspaper pages of eight columns each. Under the New Jersey Chancery Act, it would be necessary to publish the notice to all absent defendants during four consecutive calendar weeks, at least once a week (P. L. 1912, C. 155, §13; N. J. Chancery Rules, 36-38). Thus the expense of compliance with the various requirements of the statute would exceed the amount sought to be recovered in this action. Finally, to conduct to judgment a litigation against such a vast defendant population, exceeding in number all but comparatively few cities of the United States, and of some States presents an undertaking quite beyond human performance. The inevitable deaths, bankruptcies and other devolutions of interest, and consequent substitution of parties would constitute a practical bar to the trial of the action.

Nor can any rational, logical or reasonable object be accomplished by such a preposterous proceeding. The creditors of The Bank of United States have ample opportunity under the New York Banking Law, as interpreted by the New York courts, to protect their interests in the liquidation of the bank and the enforcement of the assessment liability of its stockholders (*Isaac* v. *Marcus, et al.*, 258 N. Y. 257; New York Banking Law, §120). Any creditor feeling himself aggrieved by neglect or misconduct of the Superintendent may, through proceedings in the New York tribunal having jurisdiction over the Superintendent of

Banks, obtain the necessary relief (*Isaac* v. *Marcus, supra*). Obviously, the New York tribunal, where all of the records of the liquidation and the assessment enforcement proceedings are filed (New York Banking Law, §§60, 62-4, 66, 69, 71-6, 78-9), is the only tribunal able to protect the interests of creditors and stockholders in the liquidation. Moreover, an examination of the decisions in *Broderick* v. *Adamson, et al.*, 148 Misc. (N. Y.) 353, and *Broderick* v. *Aaron, et al.*, 151 Misc. (N. Y.) 516, in which actions the assessment was reduced to judgment against more than 10,000 stockholders of the bank residing in New York, and *Broderick* v. *Stephano, et al.*, 314 Pa. 408, 171 Atl. (Pa.) 582, and *Broderick* v. *American General Corporation, et al.*, 71 F. (2d) 864, permitting enforcement of the assessment against the stockholders residing in Pennsylvania and Maryland, shows the utter futility of joining such stockholders in the New Jersey proceedings.

There is therefore no basis, in reason or logic, for the requirements of Section 94b, which was evidently enacted for the sole purpose of barring and prohibiting enforcement of assessments in New Jersey. Indeed, the statute has already been an effective weapon in preventing such proceedings by executive officers and judicial receivers of other jurisdictions who have been denied recovery in New Jersey and who have had insufficient at stake to raise the question of the constitutionality of Section 94b before this Court of last resort (*Cochrane* v. *Morris, et al.*, 10 N. J. Misc. 82).

If New Jersey by its statute may compel the New York Superintendent of Banks as a *sine qua non* to recovery from stockholders resident therein to commence an action in the Court of Chancery for an accounting to which action The Bank of United States and all of its stockholders and all

of its creditors shall be necessary parties, then we may confidently expect all states (other than those which provide for double liability upon stockholders of banks) to pass similar laws.

We may certainly look forward to the day in coming generations when banks will be much larger than the great Bank of United States, and when such actions as this must be brought in every state and possession of the United States. The practical effect of such laws, if valid, will be to deny recovery of the shareholders' liability outside the state of domicile of the corporation.

It is a well-established rule that an arbitrary and unreasonable statute which, in its necessary operation, nullifies the full faith and credit clause of the United States Constitution, is invalid. Moreover, since the assessment obligation arises out of the free and voluntary contract entered into by stockholders residing in New Jersey, and is in the nature of an ordinary commercial obligation, it may not be destroyed through a denial of the right to pursue ordinary legal remedies in the courts of New Jersey without at the same time depriving the creditors of The Bank of United States of their property without due process of law (*N. Y. Insurance Co.* v. *Dodge*, 246 U. S. 357; *N. Y. Life Insurance Co.* v. *Head*, 234 U. S. 159; *Insurance Co.* v. *Dunken*, 266 U. S. 389; *Insurance Co.* v. *Dick*, 281 U. S. 397). Again, in depriving, through the imposition of impossible conditions, the New York Superintendent of Banks, and through him the creditors of The Bank of United States, of the right to sue in New Jersey, Section 94b as applied by the judgment below violates that provision of the United States Constitution which entitles the citizens of each state to all the privileges, including the right to

sue, of the citizens in the several states (United States Constitution, Article IV, Section 2; *Corfield* v. *Coryell*, 4 Wash. (C. C.) 371, 380; *Lemmon* v. *People*, 20 N. Y. 562; *Paul* v. *Virginia*, 8 Wall. 168; *Ward* v. *Maryland*, 12 Wall. 418; *Slaughterhouse Cases*, 16 Wall. 36; *Cole* v. *Cunningham*, 133 U. S. 107; *Blake* v. *McClung*, 172 U. S. 239).

Referring to the general principle involved, Mr. Justice ROBERTS, in the recent decision of *Nebbia* v. *New York*, 291 U. S. 502, said:

> "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

Again, in *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, this Court through Chief Justice TAFT said:

> "* * * such a result as that reached by the supreme court of Nebraska is to deny the injured taxpayer any remedy at all, because it is utterly impossible for him, by any judicial proceeding, to secure an increase in the assessment of the great mass of underassessed property in the taxing district."

Similarly, in *Chicago R. R. Co.* v. *City of Chicago*, 166 U. S. 226, this Court held:

> "* * * But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the

letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form. This Court, referring to the 14th Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' Davidson *v.* New Orleans, 96 U. S., 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law."

POINT II.

Since Section 94b is unconstitutional, this action was properly instituted in the New Jersey Court of Law.

Apart from the effect of Section 94b, as declared by the Court below, it is firmly established by the highest court of the State of New Jersey that this action was properly brought at law in the State of New Jersey (*McDermott, as Receiver* v. *Woodhouse*, 87 N. J. Eq. 615; *Chicago Title & Trust Co.* v. *Young*, 90 N. J. Eq. 27; *Graham* v. *Fleissner*, 107 N. J. L. 273).

POINT III.

In any event, since the judgment below is final and the action was not transferred to the Court of Chancery of New Jersey, it is invalid.

In the Court of original jurisdiction, Mr. Justice PARKER, in his opinion, first intimated that either the action should be transferred to the New Jersey Court of Chancery or that the complaint should be dismissed with leave to institute an action in equity in compliance with Section 94b of the New Jersey statutes (R., p. 21). Thereafter, the Court entered an order over objections of counsel for plaintiff, directing not that the action be transferred to the Court of Chancery or be dismissed with leave to institute suit in equity pursuant to Section 94b of the New Jersey Corporation Act, *but that judgment final be entered in favor of the defendants* (R., p. 22). Pursuant to this order, final judgment was entered dismissing the complaint (R., p. 23). Upon appeal to the New Jersey Court of Errors and Appeals, counsel for plaintiff pointed out that the final judgment entered in the Court of original jurisdiction would be a bar to any action thereafter brought in the Court of Chancery by the Superintendent to recover the assessment liability of stockholders of The Bank of United States residing in New Jersey (Grounds of Appeal to N. J. Court of Errors and Appeals, No. 10, R., p. 28). In the Court of last resort in New Jersey counsel for plaintiff requested that if the contentions with regard to the unconstitutionality of Section 94b of the New Jersey statutes were rejected, in any event the final order and judgment of the Court below be modified so as to permit the institution of an action in

equity. The New Jersey Court of Errors and Appeals affirmed the judgment upon the opinion below and without modification (R., p. 29). This judgment was entered upon motion directed not only to the impropriety of instituting an action at law, but also to the maintenance of the action in any court in the State of New Jersey, as well as to the general insufficiency of the cause of action alleged in the complaint (R., pp. 12-14). While it would appear from the opinion of PARKER, J., that the motion was granted solely upon the failure of the plaintiff to comply with Section 94b, nevertheless the judgment entered is sufficient upon its face to incorporate all of the grounds upon which the motion was made. The final judgment dismissing the complaint entered upon such motion will therefore constitute a bar to the institution of any action by the New York Superintendent of Banks to recover the assessment from the New Jersey stockholders of The Bank of United States. Thus, in *State* v. *Wood*, 23 N. J. L. 560, the following definition of a final judgment appears:

> "The term *final*, as applied to a judgment or judicial award, has a technical, fixed and appropriate meaning. It denotes the *essential character* • • • of the order. It is used in contradiction to '*interlocutory*'."

In *Alley* v. *Nott*, 111 U. S. 472, at 475, Chief Justice WAITE said:

> "A demurrer to a complaint because it does not state facts sufficient to constitute a cause of action, is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint, on its merits, unless leave to amend

> or plead over is granted. • • • There can be no other trial except at the discretion of the court, and *if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties which can be pleaded in bar to any other suit for the same cause of action.*" (Italics ours.)

To like effect, see *Gould* v. *Evansville R. R. Co.*, 91 U. S. 526; *Hirschbach* v. *Ketchum*, 79 App. Div. 561; *Swords* v. *Nutt*, 9 Fed. (2d) 421, affirmed 11 Fed. (2d) 936; *Winship* v. *Ricketts*, 32 Fed. (2d) 476; *Highway District* v. *Bridge Co.*, 170 Ark. 22.

Under the authorities already discussed at length under Point I of this brief, the final judgment of the Court below violates the constitutional requirements aside from the question of the validity of Section 94b and the necessity of compliance with its provisions by the Superintendent.

POINT IV.

The judgment below should be reversed and the action remanded to the New Jersey Courts for further proceedings in accordance with the provisions of the Constitution of the United States.

Respectfully submitted,

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APPENDIX OF NEW YORK STATUTES.

Section 48

New York Banking Law

"Approval of superintendent; filing.—In any case in which this chapter makes the approval of the superintendent a condition precedent to the doing of any act, it shall lie within his sound discretion to grant or refuse his approval. Such approval, if granted, shall be in writing and a copy thereof shall be filed in the office of the superintendent."

Section 57

New York Banking Law

"When superintendent may take possession of delinquent corporation, banker or personal loan broker.—The superintendent may forthwith take possession of the business and property of any corporation to which this chapter is applicable, or any individual banker or personal loan broker, or any private banker to which article four of this chapter is applicable whenever it shall appear that such corporation or banker:

"1. Has violated its charter or any law;

"2. Is conducting its business in an unauthorized or unsafe manner;

"3. Is in an unsound or unsafe condition to transact its business;

"4. Cannot with safety and expediency continue business;

"5. Has an impairment of its capital;

"6. Has suspended payment of its obligations;

"7. Has neglected or refused to comply with the terms of a duly issued order of the superintendent;

"8. Has refused, upon proper demand, to submit its records and affairs for inspection to an examiner of the banking department;

"9. Has refused to be examined upon oath regarding its affairs.

"The superintendent may also forthwith take possession of the business and property of any savings and loan association which for two years after due demand or notice of withdrawal has been filed with it by any shareholder, has failed to pay matured shares or withdrawals or any part thereof as provided in section three hundred ninety-eight of this chapter."

SECTION 60

NEW YORK BANKING LAW

"Manner and time within which action of superintendent in taking possession may be tested.—At any time within ten days after the superintendent has taken possession of the property and business of any such corporation, banker or broker, such corporation, banker or broker may apply to the supreme court, in the judicial district in which the principal office of such corporation, banker or broker is located, for an order requiring the superintendent to show cause why he should not be enjoined from continuing such possession. The court may, upon good cause shown, direct the superintendent to refrain from further proceedings and to surrender such possession."

SECTION 69

NEW YORK BANKING LAW.

"Liquidation and conservation of assets; compounding debts and compromising certain claims.—The superintendent is authorized, upon taking possession of the property and business of such corporation or private or individual banker or personal loan broker, to liquidate the

affairs thereof and to do all acts and to make such expenditures as in his judgment are necessary to conserve its assets and business. He shall proceed to collect the debts due. He may upon an order of the supreme court, sell or compound all bad or doubtful debts held by, and compromise claims against such corporation, banker or broker, other than deposit claims, and, upon such terms as the court shall direct, may sell or otherwise dispose of all or any of the real and personal property of such corporation, banker or broker. In case any of the real property so sold is located in a county other than the county in which the application to the court for leave to sell the same is made, the superintendent shall cause a certified copy of said order to be filed in the office of the clerk of the county in which such real property is located."

SECTION 71

NEW YORK BANKING LAW.

"Superintendent's power to sue, execute instruments, et cetera, for delinquent; actions and proceedings preferred; exemption from filing fees.—For the purpose of executing any of the powers and performing any of the duties hereby conferred upon him, the superintendent may, in the name of the delinquent corporation or private or individual banker or personal loan broker, prosecute and defend any and all actions and legal proceedings. Any such action or proceeding, upon application of the superintendent, shall be entitled to the same preference to which an action or proceeding by or against a receiver appointed by the court is entitled in any court of the state. He may, in the name of the delinquent corporation, banker or broker, execute, acknowledge and deliver any and all deeds, assignments, bills of sale, releases, extensions, satisfactions and other instruments necessary and proper to effectuate any sale, lease or transfer of real or personal property or to carry into effect any power conferred or duty imposed upon him by this article or by order of the supreme court. Any

instrument executed pursuant to the authority hereby given shall be as valid and effectual for all purposes as though the same had been executed by the officers of the delinquent corporation by authority of its board of directors, or by the private or individual banker or personal loan broker personally. The superintendent shall not be required to pay any fee to any public officer for filing or recording any paper or instrument executed in pursuance of any power conferred on him by this section."

Section 72

New York Banking Law

"Notice to creditors to make proof of claims. When the superintendent shall have taken possession, under the provisions of section fifty-seven of this chapter of such corporation, private banker, savings and loan association, or credit union, or the business and property in this state of a foreign banking corporation and shall have determined to liquidate its affairs, or the business and property in this state of the foreign banking corporation, he shall notify all persons who may have claims against such corporations, banker, savings and loan association, credit union, or the New York agency or agencies of the foreign banking corporation, to present the same to him and make proper proof thereof within four months from the date of said notice and at a place specified therein; provided, that if the superintendent finds that a shorter period than four months will afford a reasonable time for presenting claims and making proof thereof, he may specify such shorter period which shall in no event be less than thirty days. In any event he shall specify in said notice the last date for presenting claims and the last date for making proof thereof. He shall cause said notice to be mailed to all persons whose names appear as creditors upon the books of the corporation, banker, savings and loan association, credit union or of the New York agency or agencies of the foreign banking corpo-

ration. He shall also cause said notice to be inserted weekly in such newspapers as he may direct for three consecutive months, the first insertion thereof to be published more than ninety days before the last day fixed in said notice for presenting proof of claims; provided, that where the notice requires claims to be presented within less than four months, he shall cause said notice to be inserted weekly in such newspapers as he may direct for three consecutive weeks, the first insertion thereof to be published more than twenty-one days before the last day fixed in said notice for presenting claims. The superintendent shall have no power to accept any claim presented after the date specified in such notice as the last date for presenting claims.

"Where the superintendent has taken possession of the business and property in this state of a foreign banking corporation, under the provisions of section fifty-seven of this chapter, he shall cause to be mailed to the principal office of such foreign banking corporation, or to the duly appointed domiciliary liquidator, or receiver of such foreign banking corporation, a copy of said notice together with a copy of sections fifty-seven and seventy-two of this chapter."

SECTION 73

NEW YORK BANKING LAW

"Superintendent to list claims duly presented; when and where filed.—The superintendent shall make in duplicate a complete list of all claims duly presented, and shall specify therein the name of the claimant, the nature of the claim, and the amount thereof. Within ten days after the last date fixed in said notice to creditors to present and make proof of claims, the superintendent shall file one copy of said list in his office, and cause one copy to be filed in the office of the clerk of the county in which the principal office of such corporation or private or individual banker or personal loan broker is located."

Section 74

New York Banking Law

"Objections to claims presented may be filed with superintendent within certain time; procedure upon claim under objection.—Within thirty days after the last date fixed in said notice to creditors to present and make proof of claims, objections to any claim duly presented may be made by any party interested, by filing with the superintendent such objections in writing, signed by the objector and duly verified. Unless the superintendent rejects any claim to which objections have been duly filed with him, he shall, within thirty days after the time to file such objections has expired, apply to the supreme court, upon notice to the objector, for an order directing the superintendent as to the disposition of said claim. The court may thereupon dispose of said objections or may order a reference for that purpose."

Section 75

New York Banking Law.

"Superintendent may accept or reject claims; list of claims accepted to be filed.—The superintendent shall, not later than thirty days after the time has expired to file objections to claims duly presented, accept or reject every duly filed claim except claims as to which objections are still pending undetermined by the court. Every claim accepted by him, he shall endorse 'accepted' and file so endorsed in his office. If he doubts the justice or validity of any claim, he shall reject such claim and shall endorse the same 'rejected' and file said claim so endorsed in his office. He shall cause notice of such rejection to be served upon the claimant either personally or by mail. The superintendent shall not determine priorities, in accepting or rejecting claims; but accepted claims shall be presented to the supreme court pursuant to section seventy-eight of this article for determination as to their priority of pay-

ment. Within thirty days after the superintendent has accepted or rejected all claims duly filed, he shall list all claims accepted and all rejected by him and file one copy of said list in his office and one copy in the office of the clerk of the county in which the principal office of such corporation or private or individual banker or personal loan broker is located."

SECTION 76

NEW YORK BANKING LAW.

"Effect of accepting claims; statute of limitations for actions upon claims not accepted; necessary allegations.—When the superintendent has accepted a duly filed claim and has filed the same endorsed 'accepted' in his office, the claimant, unless such claim is entitled by law to priority of payment, shall be entitled to share ratably with other general creditors in the distribution of the assets of such corporation or private or individual banker or personal loan broker as such assets are distributed pursuant to section seventy-eight of this article.

"When the time within which the superintendent is required to accept or reject claims has expired and at any time within six months thereafter, a claimant whose claim has been duly filed and has not been accepted by the superintendent may institute and maintain an action thereon against such corporation, banker or broker.

"No action shall be maintained against such corporation, banker or broker while the superintendent is in possession of its affairs and business unless brought within the period of limitation specified in this section. In all actions or proceedings instituted against such corporation, banker or broker while the superintendent is in possession of its property and business, the plaintiff shall be required to allege and prove that the claim upon which the action is instituted was duly filed and that sixty days have elapsed since the expiration of time for filing said claim and that said claim has not been accepted."

Section 78

New York Banking Law.

"Dividends to creditors; priorities; disposition of unclaimed dividends.—At any time after the date fixed by the superintendent for the presentation of claims, the supreme court may by order authorize the superintendent upon his application to declare out of the funds remaining in his hands after the payment of expenses, one or more dividends. Such order shall specify what claims, if any, are entitled to priority of payment, and shall direct the superintendent regarding the manner of payment of such prior claims. At any time after the expiration of eight months from said date fixed for the presentation of such claims, he may by like order declare a final dividend. Such dividends shall be paid to such persons, in such amounts, and upon such notice, as the supreme court in the judicial district in which the principal office of such corporation or private or individual banker or personal loan broker is located, may by order direct. Dividends remaining unclaimed or unpaid in the hands of the superintendent for six months after the order for final distribution, shall be deposited by him as provided in section forty-five of this article."

Section 79

New York Banking Law.

"Superintendent shall call stockholders' meeting after creditors are paid in full; proceedings at such meeting.—Whenever the superintendent shall have paid to each creditor of any stock corporation whose claim has been duly proved the full amount of such claim, and shall have made proper provision for claims in litigation and not finally determined, and shall have paid all the expenses of liquidation, and shall have returned to stockholders who have paid to him the amounts demanded pursuant to section eighty of this article, their pro rata share of any such

amounts not finally necessary to pay creditors in full, he shall call a meeting of the stockholders of such corporation by causing notice of the time and place of such meeting to be published at least once a week for three successive weeks in one or more newspapers selected by him and published in the county where the principal office of such corporation is located. At such meeting, the stockholders shall determine whether the superintendent shall continue as liquidator to wind up the affairs of such corporation, or whether the stockholders themselves shall elect an agent or agents for that purpose. In determining these matters, the stockholders shall vote by ballot in person or by proxy. Each share of stock shall be entitled to one vote and the vote of a majority of the issued stock shall be necessary to a determination. In case it is determined to continue the liquidation under the superintendent, he shall continue the liquidation of the affairs of such corporation and after paying the expenses thereof, shall distribute the proceeds among the stockholders in proportion to the several holdings of stock and in such manner and upon such notice as may be directed by order of the supreme court. Upon a petition by the superintendent showing that all the assets of such corporation have been duly distributed and that unclaimed sums have been duly deposited by him as provided in section forty-five of this article and that more than one year has elapsed since the last required publication of notice to creditors to present their claims, and upon such notice as the court may prescribe, the supreme court may, on such terms as justice requires, make an order affirming such dispositoin of such unclaimed sums and declaring such corporation dissolved and the corporate existence thereof terminated. Upon the filing of a certified copy of such order in the office of the superintendent, the existence of such corporation shall cease and determine.

"In case the stockholders shall determine to appoint an agent or agents to continue such liquidation, they shall thereupon select by ballot such agent or agents. A ma-

jority of the stock present and voting in person or by proxy shall be necessary to determine such question. If such agent or agents shall be duly elected by the stockholders, the superintendent may require such agent or agents to execute and deliver to him a bond to the people of the state, in such amount, with such sureties, and in such form as shall be approved by him, conditioned upon the performance of all the duties of his or their trust; and thereupon the superintendent shall transfer and deliver to such agent or agents all the assets of such corporation then remaining in his hands. Upon such transfer and delivery, the superintendent shall be discharged from any and all further liability to such corporation and its creditors. Upon the transfer and delivery of said assets by the superintendent, he shall file a certified copy of the proceedings of said meeting in his office and cause a certified copy to be filed in the office of the clerk of the county in which the principal office of such corporation was located. No banking powers shall be exercised by such corporation after the superintendent has filed such certified copy in his office."

SECTION 80

NEW YORK BANKING LAW.

"Superintendent may enforce payment of statutory liability of stockholders; notice thereof, and effect of failure to pay at time fixed.—Whenever a liability of stockholders for the amount of their respective shares of any such corporation exists, and the superintendent has duly taken possession of the property and business of such corporation, and has duly notified creditors to present and make proof of their respective claims and the last day to present such claims has expired, and he has determined from his examination of its affairs that the reasonable value of the assets of such corporation is not sufficient to pay its creditors in full, he may enforce the individual liability of such stockholders in whole or in part. In case he determines to en-

force such liability, he shall make demand in writing upon such stockholders by causing such demand to be enclosed in sealed envelopes addressed and mailed, postage prepaid, to said respective stockholders at their last known places of address as the same appear upon the stock ledger of such corporation or at their last known address if no address appears in said ledger. Such demand shall state the total amount assessed by the superintendent against the stockholders and the equal and pro rata share assessed against each stockholder for each share of stock, and the total amount of such assessment for all the shares of stock of such stockholder. Such demand shall also fix a date, not earlier than thirty days from the date of such notice, upon which such stockholders shall be required to pay such assessment to the superintendent. In case any such stockholder shall fail or neglect to pay such assessment within the time fixed in said notice, the superintendent shall have a cause of action, in his own name as superintendent of banks, against such stockholder either severally or jointly with other stockholders of such corporation, for the amount of such unpaid assessment or assessments, together with interest thereon from the date when such assessment was, by the terms of said notice, due and payable. In any such action, the written statement of the superintendent, under his hand and seal of office, reciting his determination to enforce the individual liability, or any part thereof, of such stockholders, and setting forth the value of the assets of such corporation and the liabilities thereof, as determined by him after examination and investigation, shall be presumptive evidence of such facts as therein stated."

SECTION 120

NEW YORK BANKING LAW

"Rights and liabilities of stockholders; who liable as stockholders; who may enforce liability; within what time action must be commenced.—The rights, powers and duties

of stockholders of banks shall be as prescribed in the general corporation law and the stock corporation law; but the individual liability of such stockholders for the contracts, debts, and engagements of the bank and the time within which an action may be instituted to enforce such liability shall be governed exclusively by the provisions of this section and section eighty of this chapter.

"The stockholders of every bank shall be individually responsible, equally and ratably and not one for another, for all contracts, debts and engagements of the bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. An action to enforce such liability must be brought within six years after the cause of action has accrued. The term 'stockholder' as used in this section shall apply to:

"1. Such persons as appear by the books of the bank to be stockholders;

"2. Every owner of stock, legal or equitable, although the same may be on such books in the name of another person, provided, however, that such term shall not apply to a person holding stock as collateral security for the payment of a debt and not appearing by the books of the bank to be the owner and holder thereof in his own right, or to a person holding stock in a bona fide fiduciary capacity and not appearing by the books of the bank to be the owner and holder thereof in his own right unless such fiduciary shall have invested the funds in his care in violation of law or of the terms under which said funds are held by him, in which case he shall be personally liable as a stockholder.

"No person who has in good faith, and without any intent to evade his liability as a stockholder, caused his stock to be transferred on the books of the bank when such bank is solvent to any resident of this state of full age previous

to any default in the payment of any debt or liability of the bank, shall be subject to any personal liability for any contracts, debts or engagements of the bank.

"In case the superintendent of banks shall have taken possession of the property and business of the bank pursuant to section fifty-seven of this chapter or a permanent receiver of such bank shall have been appointed, all actions or proceedings to enforce the liability of stockholders under this section shall be taken and prosecuted only in the name of the superintendent or the receiver, as the case may be, unless the superintendent or receiver shall refuse to take such action or proceeding upon proper request in writing made by any creditor, or shall have failed or neglected to commence such action or proceeding within sixty days after the receipt of such request, and in that event such action or proceeding may be taken by any creditor of the bank. But no such action shall be brought by a creditor until a judgment shall have been recovered by him against the bank and an execution thereon shall have been returned unsatisfied in whole or in part."

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 528.

JOSEPH A. BRODERICK, as Superintendent of Banks of the State of New York,
Appellant,

vs.

MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, *et al.*

Appeal from the Court of Errors and Appeals of State of New Jersey.

REPLY BRIEF FOR APPELLANT.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 528.

JOSEPH A. BRODERICK, as Superintendent of Banks of the State of New York,

Appellant,

vs.

MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, *et al.*

Appeal from the Court of Errors and Appeals of the State of New Jersey.

REPLY BRIEF FOR APPELLANT.

POINT I.

Answering the contention that the Superintendent of Banks is a mere receiver, without authority to enforce the assessment in jurisdictions other than New York (brief of Bobdon, *et al.*, pages 2-8; brief of Anderson, *et al.*, pages 34-36).

In arguing that the New York Superintendent of Banks is a mere receiver, appellees have confused his status as liquidator of the assets of the Bank with his wholly different position in enforcing the assessment. Under the New York law the Bank has no title to or right to enforce the assessment (*Van Tuyl* v. *Schwab*, 165 App. Div. 412, 150 N. Y. Supp. 786; *Broderick* v. *Adamson*, 146 Misc. 414, 262 N. Y. Supp. 204; *Broderick* v. *Adamson*, 148 Misc. 353, 265 N. Y. Supp. 804; *Broderick* v. *Britting*, 147 Misc. 363,

264 N. Y. Supp. 8), which is a direct liability of stockholders to creditors, and is enforced by the Superintendent solely on their behalf (*Hirshfeld* v. *Fitzgerald,* 157 N. Y. 166; *Farnsworth* v. *Wood,* 91 N. Y. 308; *Van Tuyl* v. *Scharmann,* 208 N. Y. 53. *Cf. Lantry* v. *Wallace,* 97 Fed. 865, *aff'd* 182 U. S. 536). Thus, in prosecuting or defending claims by or against the Bank the Superintendent acts in the name of the Bank (*New York Banking Law,* §71), whereas in enforcing the *assessment* he acts in his own name as Superintendent of Banks (*New York Banking Law,* §§80, 120). Stockholders who are depositors are not permitted to offset their deposit balances against the assessment liability since their deposit claims are against the Bank, which has no interest in the assessment liability (*Van Tuyl* v. *Schwab,* 165 App. Div. 412, 150 N. Y. Supp. 786; *U. S. Trust Co.* v. *U. S. Fire Ins. Co.,* 18 N. Y. 199; *Richards* v. *Schwab,* 101 Misc. 128, 167 N. Y. Supp. 535; *Barnes, et al.* v. *Trevor, et al.,* 45 App. Div. 314; 61 N. Y. Supp. 85; *aff'd* 169 N. Y. 611; *Broderick* v. *Adamson,* 146 Misc. 414, 262 N. Y. Supp. 204; *Broderick* v. *Adamson,* 148 Misc. 353, 265 N. Y. Supp. 804; *Broderick* v. *Britting,* 147 Misc. 363, 264 N. Y. Supp. 8). Thus, assuming for the purpose of the argument that in liquidating the assets of the Bank the Superintendent is a statutory receiver (*Isaac* v. *Marcus,* 258 N. Y. 257; *Matter of Union Bank,* 204 N. Y. 313; *Lafayette Trust Co.* v. *Higginbotham,* 136 N. Y. App. Div. 747), this has no relation to or bearing upon his wholly independent position in enforcing the assessment. In the latter case he acts as agent or trustee on behalf of creditors pursuant to a statute which vests in him title to the cause of action (*Converse* v. *Hamilton,* 224 U. S. 243; *Broderick* v. *McGuire,* 119 Conn. 83; *Clark* v. *Williard,* 292 U. S. 112).

This distinction disposes of all of the authorities referred to in the brief submitted on behalf of appellees, Bobdon, *et al.*, pages 2-8, and the brief of appellees, Anderson, *et al.*, pages 34-36, which relate only to the status of the Superintendent as liquidator. The Court in *Van Tuyl* v. *Carpenter*, 135 Tenn. 629, 188 S. W. 234, relied upon by appellees, obviously erred in amalgamating the status of the Superintendent as liquidator with his independent function in enforcing the assessment.

POINT II.

Answering the contention that the levy of an assessment by the New York Superintendent of Banks is not conclusive under the law of New York (brief of Anderson, *et al.*, pages 5-9).

It is not material that there has been no decision by the New York Court of Appeals on the precise question of the conclusive effect of the Superintendent's determination. The statute is clear, the lower court of New York has spoken (*Broderick* v. *Adamson, et al.*, 148 N. Y. Misc. 353), and the conclusive effect of such determination has been judicially upheld generally wherever the question has been presented for decision. (See main brief for Appellant, pp. 17-38.)

Moreover, the New York Court of Appeals has repeatedly held that official action of public officers, including that of the Superintendent of Banks, is presumed to be valid within the limitations referred to in our main brief (see main brief of Appellant, pp. 17-32). This rule is indeed required, in order that the fundamental segregation and

independence of the judicial, legislative and executive branches of the state government be preserved (*Marbury* v. *Madison*, 5 U. S. (1 Cranch.) 135; *People* v. *Tremaine*, 252 N. Y. 27; *Matter of Richardson*, 247 N. Y. 401; *People ex rel. Broderick* v. *Morton*, 156 N. Y. 136; *East River Gas & Light Co.* v. *Donnelly*, 93 N. Y. 557; *Brady* v. *Mayor*, 112 N. Y. 480; *Mitchel* v. *Cropsey*, 177 App. Div. 663, 164 N. Y. Supp. 336; *Holly* v. *City of New York*, 128 App. Div. 499, 112 N. Y. Supp. 797; *Dillon* v. *Butler, Inc.*, 174 N. Y. Supp. 198, not officially reported).

Obviously, as pointed out in *Broderick* v. *Adamson, et al.*, 148 N. Y. Misc. 353 (main brief for Appellant, pp. 27-29), and *Matter of Union Bank*, 176 App. Div. 477 (main brief for Appellant, pp. 25-27), should a Court, upon mere differences of opinion, review and reverse the official action of the Superintendent upon the question of the necessity of the assessment, it would thereby improperly impose its own judgment upon a matter vested by statute in the sound discretion of the executive branch of the government. The rule that executive action is presumed to be valid, or in other words is conclusive in the absence of fraud, bad faith, or clear error of law, is thus but a recognition of this segregation of powers and necessary to preserve the independence of the executive. The mere application of this fundamental doctrine to the levy of an assessment by the Superintendent of Banks is not a controversial question which may be considered doubtful under the law of New York in the absence of specific treatment by the New York Court of Appeals. The rule of *Broderick* v. *Adamson, et al.*, 148 Misc. 353, is thus a reiteration of a fundamental principle firmly imbedded in the jurisprudence of New York.

Section 80 provides that the Superintendent may execute a certificate reciting his determination and setting forth the value of the assets and the amount of the liabilities of the bank. Under the statute this certificate is "presumptive evidence" of the facts recited. But this does not conflict with our position that the determination, as an official act, is entitled to the conclusive weight and effect ordinarily attaching to executive action. In the absence of this provision of the statute, it would be necessary for the Superintendent to establish by other oral or documentary evidence that he had made an official determination of the necessity of the assessment. The statute facilitates such proof by authorizing the execution of a certificate reciting his determination to levy the assessment and the facts upon which the determination was based. It thereby becomes unnecessary for the Superintendent or his deputies personally to appear upon a trial in order to establish that the determination was made. This does not impair the official character of the determination. Stated differently, the mere provision that a certificate reciting the determination and the facts upon which it was based shall be presumptive evidence of the facts recited, does not deprive the determination of its official character or conclusive effect.

POINT III.

Answering the argument that executive acts of state officers are not "public acts" within the full faith and credit clause of the Constitution (brief of Anderson, *et al.*, pages 6-8).

Appellees contend that the full faith and credit clause of the Constitution applies only to state legislation, and that although the determination by the New York Superintendent of Banks of the necessity of an assessment is an official act of a public officer of New York, it is not a "public act" within the meaning of the Constitution. In support of this argument, the first draft of the full faith and credit clause before the Committee of Detail of the Constitutional Convention is referred to. This draft provides:

> "Full faith and credit shall be given in each state to the acts of the legislature and to the records and judicial proceedings of the courts and magistrates of every other state" (Story on Constitution, 4th ed., vol. 2, Section 1303).

When the Constitution was finally adopted, the clause "acts of the legislature" was eliminated, and in its place was inserted the more general phrase, "public acts" (*Constitution*, Art. IV, §1). Appellees reason from this that the term "public acts" in the Constitution as finally adopted was intended to refer solely to "acts of the legislature", which is the language of the draft. The contrary, however, was obviously intended. Had the purpose been to restrict the operation of the full faith and credit clause to state statutes, the explicit language of the draft would have

been retained. The elimination of this restrictive language and the adoption in the Constitution of the broader term "public acts" constitutes recognition by the framers of the Constitution of the desirability of requiring faith and credit not only of acts of the legislature, public records and judgments, but also of all proclamations, orders, certificates and determinations of executive officers. Public acts may properly be said to include all official actions made and taken under the lawful authority of a sovereign state. The words include "acts of the legislature"; they include official action taken by the state through its designated officers or agents pursuant to state law. "Public acts" are words of the broadest comprehension; they are not restrictive. Like the words "due process of law" they are all inclusive. They were intended to accord full faith and credit in other states to whatsoever a state may do in the orderly exercise of its governmental functions.

This Court has never to our knowledge limited the words "public acts" as used in the Constitution to legislation. In view of the modern tendency to delegate numerous and vital functions of government to executive officers, a broad interpretation of the constitutional provision which will embrace within this phrase not only state legislation but also executive action thereunder, is required and necessary.

POINT IV.

Answering the contention that the certificate of the Superintendent reciting his determination to levy the assessment and the facts upon which such determination was based, need not be recognized by New Jersey under the full faith and credit clause of the Constitution (brief of Anderson, *et al.*, pages 5, 6).

It is argued that the certificate of the Superintendent is merely "presumptive evidence" under the law of New York, and is therefore entitled to no faith and credit in any other jurisdiction. But the certificate of the Superintendent is more than an ordinary written instrument having mere evidentiary value under the law of New York. It is a document prepared and executed by a public officer pursuant to statute and in the course of the performance of official duties (*New York Banking Law*, §80). Section 11 of the New York Banking Law provides as follows:

> "Official seal of superintendent; sealed instruments to be received in evidence and recorded.—The secretary of state shall provide the superintendent of banks with an official seal. Every paper executed by him as such superintendent in pursuance of any authority conferred on him by law, and sealed with his seal of office, shall be received in evidence, and may be recorded in the proper recording offices in the same manner and with the same effect as a deed regularly acknowledged."

Under this statute, the certificate of the Superintendent is an official document entitled to permanent preservation as a public record of the State of New York. Under Article

IV, Section 1, of the Constitution, public records are entitled to full faith and credit. Pursuant to its constitutional authority, Congress has provided the faith and credit to which public records of one state are entitled in the courts of another. Thus, United States Revised Statutes, Section 906 (28 U. S. C. A., §688), provides as follows:

> "PROOFS OF RECORDS IN OFFICES NOT PERTAINING TO COURTS.' All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory, or country, that the said testation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. *And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken.*" (Italics ours.)

The certificate of the Superintendent of Banks, being a public record of the State of New York, is therefore under this act of Congress entitled to the same force and effect in the Courts of New Jersey as is given to such certificate "by law • • • in the courts • • • of the state • • •" from which it is taken, in other words, in the courts of New York. It is equally obvious that since Section 94b of the New Jersey Corporation Act prohibits the institution of any action upon the assessment (main brief for appellant, pp. 74-82), it necessarily operates to deprive this public record of New York of that faith and credit required under the Constitution of the United States and the federal statute above quoted.

POINT V.

Answering the contention that under the Constitution New Jersey is not required to give full faith and credit to Article VIII, Section 7, of the New York Constitution or Sections 80 and 120 of the New York Banking Law (brief of Anderson, *et al.*, pages 6-8, 15-22; brief of Bobdon, *et al.*, page 18; brief of Rosner, *et al.*).

It is urged that the full faith and credit clause of the Constitution requires enforcement of judgments, but not of state statutes (*Brief of Anderson, et al.*, pp. 6-8, 15-22; *Brief of Bobdon, et al.*, p. 18). Appellees contend that the constitutional provision is not self-executing, citing *McElmoyle* v. *Cohen*, 13 Peters 312, *Alabama State Bank* v. *Dalton*, 9 How. 522, *Roller* v. *Murray*, 234 U. S. 738, and *Tilt* v. *Kelsey*, 207 U. S. 43 (*Brief of Anderson, et al.*, pp. 15-16), and that the operation of the full faith and credit clause de-

pends entirely upon Revised Statutes, Section 905 (Act May 26, 1790, c. 11, 1 Stat. 122, U. S. C. A., Title 28, §687).

The simple question is thus presented, whether the laws of New York providing that stockholders of New York banks shall be liable for an assessment must be recognized by New Jersey.

The Constitution specifically provides that full faith and credit be given not only to "judicial proceedings" but also to "records" and "public acts"; and it is conceded by appellees that the Constitution and Banking Law of the State of New York are "public acts" within the meaning of this provision of the Constitution of the United States (*Brief of Anderson, et al.*, p. 8; *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 154).

There is no merit to the suggestion that, aside from Revised statutes, Sections 905 and 906 (Act of May 26, 1790, c. 11, 1 Stat. 122, U. S. C. A., Title 28, §§687, 688), the full faith and credit clause of the United States Constitution is a dead letter and utterly meaningless. Nothing said or held in *McElmoyle* v. *Cohen*, 13 Peters 312, *Alabama State Bank* v. *Dalton*, 9 How. 522, *Roller* v. *Murray*, 234 U. S. 738, or *Tilt* v. *Kelsey*, 207 U. S. 43, relied on by appellees, supports their statement. On the contrary, in *McElmoyle* v. *Cohen*, it is specifically stated at pages 324 *et seq:*.

> "* * * The authenticity of a judgment and its effect, depend upon the law made in pursuance of the Constitution; the faith and credit due to it as the judicial proceeding of a State, *is given by the Constitution, independently of all legislation.* * * *"* (Italics ours.)

Similarly, the manner of proving state legislation may depend upon congressional legislation, but the Constitution

provides, independent of all congressional enactment, that public acts of each state are entitled to full faith and credit.

Again, Section 905 specifically refers not only to judicial proceedings but also to the acts of the legislature of states, and provides a method for their authentication. If such acts of the legislature were entitled to no faith and credit, there would have been no purpose to this congressional provision for the manner of establishing the authenticity of such acts. The obvious conclusion required by the constitutional provision and the act of Congress pursuant thereto, is that not only judicial proceedings but also public acts of states are entitled to full faith and credit. We may assume for the argument, that ordinarily, the operation of state legislation is confined within the borders of the state. This is not so, however, when contract rights in assessments against stockholders arising upon or flowing from legislation of the state of incorporation became vested in that state under its laws.

Considerations of practicality and policy similar to those emphasized by this Court in the fraternal society cases (Main Brief for Appellant, pp. 42-48) apply equally, if not with greater force, to the enforcement of assessments against stockholders of banks provided by the laws of the state of incorporation. The widespread importance of maintaining the financial soundness and solvency of banking institutions and of providing methods whereby depositors may be repaid in full in the event of insolvency, has been demonstrated so clearly by the recent financial crisis as to need no extended discussion.

Moreover, there is, and indeed there properly can be no public policy in New Jersey against the enforcement of the assessment liability against stockholders of banks of

foreign states. Thus the fact that New Jersey does not provide that stockholders of its banks shall be liable for an assessment is no evidence that the enforcement of assessments levied under the laws of the State of New York is obnoxious to the public policy of New Jersey (*Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145; *Broderick* v. *McGuire, et al.*, 119 Conn. 83). Further, the very provisions of Section 94b of the New Jersey Corporation Act establish that such enforcement is not obnoxious to its public policy. That act attempts affirmatively to provide a method for the enforcement of such assessments in New Jersey. Through inadvertence, or failure adequately to consider the varied assessment statutes of other states, or the principles governing service of process, this statute operates to bar and prohibit enforcement of such assessments in New Jersey (Main Brief for Appellant, pp. 74-82). But this is a consequence of legislation, which, rather than indicating a public policy of New Jersey against enforcement of such assessments, on the contrary merely specifies conditions to enforcement which while designed to be fair to New Jersey residents operate to deny all remedy.

But aside from this, it has been held by this Court that the state of incorporation shall have the exclusive right to determine whether stockholders shall be liable in addition to their subscriptions, and that no other state may in this situation have an adverse public policy. Thus, in *Converse* v. *Hamilton*, 224 U. S. 243, at page 260 this Court said in relation to the Minnesota assessment statutes:

> "• • • The subject to which chapter 272 is addressed is peculiarly within the regulatory power of the state of Minnesota; *so much so that no other*

state properly can be said to have any public policy thereon. * * *" (Italics ours.)

See also, *Bond* v. *Hume*, 243 U. S. 15.

Nothing said or held in *Texas & Pac. R. R. Co.* v. *Cox*, 145 U. S. 593, *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142, *Atchison, Topeka, etc., Co.* v. *Nichols*, 264 U. S. 348, *Spokane I. E. R. Co.* v. *Whitley*, 237 U. S. 487, or *Union Trust Co.* v. *Grossman*, 245 U. S. 412, relied upon by appellees, conflicts with our contention. In none of these cases was the full faith and credit clause of the Constitution raised by the parties. Indeed, in *Texas & Pac. R. R. Co.* v. *Cox*, 145 U. S. 593, *Dennick* v. *Central R. Co.*, 103 U. S. 11, *Atchison, Topeka, etc., Co.* v. *Nichols*, 264 U. S. 348, *the duty to give effect to statutes of other states which could not properly be said to be obnoxious to the policy of the forum, was recognized.*

We revert to the contention appearing at pages 6 to 8 of the brief of appellees, *Anderson, et al.*, that the determination by the New York Superintendent of Banks of the necessity of the assessment is not a public act entitled to full faith and credit in New Jersey: But if we are correct in our main contention that New Jersey must recognize and give effect to Section 80 of the New York Banking Law, it follows that New Jersey must also recognize the acts of the Superintendent pursuant thereto, and which are necessary in order to render the statute operative and effective. In other words, the Constitution cannot be satisfied by the mere device of recognizing the statute while at the same time disregarding those acts taken pursuant to the statute and which are essential to its execution (*Converse* v. *Hamilton*, 224 U. S. 243).

POINT VI.

Answering the contention that Section 94b of the New Jersey Corporation Act does not deprive the New York Superintendent of Banks and, through him, the creditors of the Bank of United States of property without due process of law (brief of Bobdon, *et al.*, pages 20-22; brief of Anderson, *et al.*, pages 29-32).

It is significant that appellees attempt to sustain the New Jersey statute under the due process clause of the Constitution upon the contention that it provides a remedy adequate for the occasion and is not invalid merely because it is difficult to comply with the statute. This necessarily implies a concession that if Section 94b is an absolute bar to the enforcement of the assessment in New Jersey, it deprives plaintiff and through him the creditors of The Bank of United States of property without due process of law. (Main Brief for Appellant, pp. 74-76.)

In *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, Mr. Justice Roberts, speaking for this Court, said:

> "Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws, *it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations.* * * * *A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts*

of the forum, regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment.'' (Italics ours.)

POINT VII.

Answering the contention that although it may be difficult it is not impossible to comply with the requirements of Section 94b (brief of Anderson, *et al.*, pages 31-32; brief of Bobdon, *et al.*, page 22).

It is urged that the difficulties confronting plaintiff in attempting to comply with Section 94b arise not because of any defects in the New Jersey statute but solely because of the vast number of depositors and stockholders of The Bank of United States. Thus, it is argued that the remedy of Section 94b is reasonable and adequate where recovery is sought in actions against stockholders of insolvent banks having few stockholders and creditors. But appellees overlook the requirement of Section 94b that all creditors and all stockholders as well as the insolvent foreign corporation are ''necessary parties'' to the action. It is therefore essential to recovery in New Jersey that personal service be effected upon or jurisdiction be properly obtained over non-residents. The bank being a foreign corporation jurisdiction must be obtained by personal service to be valid and effectual. Thus no matter how limited in number are the creditors and stockholders of the foreign corporation, it is impossible to obtain jurisdiction over all of these ''necessary parties''. It therefore follows that under Section 94b no action upon an assessment may be maintained in that state.

POINT VIII.

Answering the contention that New Jersey may bar enforcement of contract rights vested under statutes of other states through withdrawing jurisdiction from its courts (brief of Anderson, *et al.*, pages 9-13; brief of Bobdon, *et al.*, pages 15-18; brief of Rosner, *et al.*).

The position of appellees appears to be (1) that Section 94b withdraws jurisdiction from the Courts of New Jersey to hear the present controversy; and (2) that each state has the exclusive right to withdraw jurisdiction from its Courts. The full faith and credit clause of the Constitution, it is argued, operates only where there is a State Court with adequate jurisdiction over the subject matter of the controversy which refuses to accept as evidence properly authenticated statutes, judgments and public records of other states.

(1) This action was commenced in the New Jersey Supreme Court. The jurisdiction of the New Jersey Supreme Court is both original and appellate. Its jurisdiction is accurately stated in "The Courts of New Jersey" by Clevenger and Keasbey, 1903. Speaking of the original jurisdiction of the Supreme Court this work says:

> "It has original cognizance of all actions and demands at common law, whether real, personal or mixed. In general it possesses all the common law jurisdiction of the several courts of King's Bench, Common Pleas and Exchequer in England, unless where specially restrained by the constitution."

The New Jersey Court of Errors and Appeals said in *Flanigan* vs. *Guggenheim Smelting Company*, 63 N. J. L., 647, at page 650:

> "Section 1, of article 7, of the constitution provides that 'the judicial power shall be vested in a court of errors and appeals in the last resort in all causes as heretofore; a court for the trial of impeachment; a court of chancery; a prerogative court; a supreme court; circuit courts, and such inferior courts as now exist, and as may be hereafter ordained and established by law; which inferior courts the legislature may alter or abolish as the public good shall require'.
>
> It will be admitted that these provisions guarantee the integrity of the constitutional courts, of which the Supreme Court is one. Whatever powers that court had, whatever jurisdiction that court exercised, at the date of the adoption of the constitution, were by such adoption incorporated into the fundamental law and ensured against destruction or abridgment except through a change in the fundamental law itself. To abolish the court, to alter its organic character, to impair its jurisdiction, to diminish its authority, are beyond legislative power, because that character, jurisdiction and authority form part of a body of law which, upon wise grounds, has been made immutable by any mere legislative act."

In *Graham* vs. *Fleissner*, 107 N. J. L., 278 (1930), the Court of Errors and Appeals affirmed a judgment entered in the Supreme Court for an assessment upon an unpaid subscription against a stockholder of a Delaware corporation, levied in a bankruptcy proceeding against the corporation in New York. There is no distinction between the form of action to recover on an assessment duly levied

against stockholders for unpaid stock subscriptions, and an assessment levied by a superintendent of banks against stockholders of a bank to recover their double liability as stockholders. [Compare: *Schriver* v. *Woodbine Savings Bank*, 285 U. S. 467, with cases cited in main brief for appellant, pp. 16, 17; see also *Kennedy* v. *Gibson*, 75 U. S. 476; *Studebaker* v. *Perry*, 184 U. S. 258, and *Broderick* v. *American General Corporation, et al.*, 71 Fed. (2d) 864.]

In this situation it is clear that Section 94b does not, and cannot affect the *power* or jurisdiction of the New Jersey Supreme Court. Thus we believe it clear that had the New Jersey Supreme Court entered judgment for plaintiff against any of the defendants, this judgment would be enforcible in any other state and could not be impeached on the ground that the judgment was entered without jurisdiction. This question was discussed in *Fauntleroy* v. *Lum*, 210 U. S. 230. In that case a Mississippi statute provided that dealing in futures shall be a misdemeanor and that such contracts "shall not be enforced by any court." This statute, it was held, did not go to the jurisdiction of the Mississippi Court but merely sought to impose a duty upon it to dismiss such an action if instituted. This Court, speaking through Mr. Justice Holmes, said:

> "The laws of Mississippi make dealing in futures a misdemeanor, and provide that contracts of that sort, made without intent to deliver the commodity or to pay the price, 'shall not be enforced by any court.' Annotated Code of 1892, §§1120, 1121, 2117. The defendant contends that this language deprives the Mississippi courts of jurisdiction, and that the case is like Anglo-American Provision Co. *v.* Davis

Provision Co., 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92. • • •

"No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty, of the court. Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reversed. Yet a statute could be framed that would make the power, that is, the jurisdiction, of the court, dependent upon whether there was a consideration or not. Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense. *When it affects a court of general jurisdiction, and deals with a matter upon which that court must pass, we naturally are slow to read ambiguous words as meaning to leave the judgment open to dispute, or as intended to do more than to fix the rule by which the court should decide.*

"The case quoted concerned a statute plainly dealing with the authority and jurisdiction of the New York court. The statute now before us seems to us only to lay down a rule of decision. The Mississippi court in which this action was brought is a court of general jurisdiction and would have to decide upon the validity of the bar, if the suit upon the award or upon the original cause of action had been brought there. The words 'shall not be enforced by any court' are simply another, possibly less emphatic, way of saying that an action shall not be brought to enforce such contracts. As suggested by the counsel for the plaintiff in error, no one would

> say that the words of the Mississippi statute of frauds, 'An action shall not be brought whereby to charge a defendant,' Code 1892, §4225, go to the jurisdiction of the court. Of course it could be argued that logically they had that scope, but common sense would revolt. See 191 U. S. 375, 48 L. ed. 227, 24 Sup. Ct. Rep. 92. A stronger case than the present is General Oil Co. *v.* Crain, 209 U. S. 211, 216, *ante*, 754 758, 28 Sup. Ct. Rep. 475." (Italics ours.)

Similarly, Section 94b which merely provides that "no action or proceeding shall be maintained in any court of law of this state" and further "no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in the nature of an equitable accounting" does not, and cannot affect the general jurisdiction of the New Jersey Supreme Court over the present cause of action based upon contract.

(2) Appellees rely upon *Missouri* v. *Lewis*, 101 U. S. 22; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373, and *McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230, to sustain their position that no withdrawal by a state of jurisdiction from its courts can be considered invalid under the Constitution of the United States. These cases are, however, readily distinguishable and a complete study of the principle involved furnishes ample precedent for the contrary proposition.

Thus, *Missouri* v. *Lewis*, 101 U. S. 22, involved the following facts: Under the Constitution and laws of Missouri, appeals to the Court of last resort in that state were

allowed only in enumerated instances and not from a judgment removing attorneys from practice at the bar. The petitioner applied for mandamus to compel the Courts of Missouri to permit an appeal to the Court of last resort, and from a denial of the writ appealed to this Court. In affirming the judgment of the Court below, this Court pointed out that under the Missouri judicial system, the petitioner had had the benefit of an appeal and that the refusal to permit an appeal to the Court of last resort in that jurisdiction violated no constitutional requirement. The case, therefore, has no bearing upon the present appeal.

Wisconsin v. *Pelican Ins. Co.*, 127 U. S. 265, was an action originally instituted in this Court by the State of Wisconsin upon a judgment recovered by said state against a Louisiana corporation doing business in Wisconsin for a penalty imposed by the statutes of that state. This Court held that its original jurisdiction to hear suits by a state against citizens of other states applied only where the litigation is of a civil character and not where the action is to recover upon a penal statute. Thus the precise question presented for determination did not remotely involve the full faith and credit clause of the Constitution.

In discussing and distinguishing various state decisions, the Court referred to the full faith and credit clause as merely evidentiary. It is upon this portion of the opinion that appellees rely. This portion of the opinion subsequently came up for consideration in *Fauntleroy* v. *Lum*, 210 U. S. 230. There the following facts were involved. A contract dealing with cotton futures was made in Mississippi. The laws of Mississippi provided that such transactions constituted misdemeanors and were unenforcible. Thereafter the contract was submitted for arbitration in Mississippi

and its illegality was not raised by the defendant and an award rendered against him. The defendant failed to pay and subsequently the plaintiff finding the defendant in Missouri, commenced an action there. In the Missouri action the Trial Court refused to allow the defendant to show the illegal nature of the transaction but directed the jury to return a verdict for the plaintiff if it found that an award was made in Mississippi and remained unpaid. The jury returned a verdict for the plaintiff and judgment was thereupon entered. Subsequently an action was commenced in Mississippi against the defendant upon the judgment obtained in Missouri. In that action the defendant established that the original transaction was illegal and void and the defense was sustained by the Mississippi Courts. Upon appeal to this Court it was argued that the full faith and credit clause of the Constitution is merely evidentiary and under the authority of *Wisconsin* v. *Pelican Ins. Co., supra,* did not prevent the Mississippi Court from reviewing the issues determined in Missouri or rendering a verdict against the plaintiff on the ground that the underlying transaction countervened its public policy. In rejecting this contention, this Court said:

> "But the law is supposed to have been changed by the decision in *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370. • • • However, the whole passage was only a *dictum* and it is not worth while to spend much time upon it."

Appellees also rely upon *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373. That was an action brought in New York by one foreign corporation against a second foreign corporation upon a judgment recovered in

a state other than New York. Upon motion, the complaint was dismissed under Section 1780 of the New York Code of Civil Procedure, which provided that actions by one foreign corporation against another may be prosecuted in New York only where the cause of action arose in New York. The dismissal of the complaint was affirmed by the New York Court of Appeals. Thereupon an appeal was taken to this Court upon the ground that the New York Code was unconstitutional. In sustaining the right of New York in this stituation to withhold jurisdiction from its Courts, this Court pointed out that it is a general power of one state "to restrict the right of a foreign corporation to sue in its courts".

The identical principle relied upon by appellees that under this decision a state may escape its constitutional obligations by withdrawing jurisdiction from its Courts was directly presented and passed upon in the subsequent decision of *Kenney* v. *Loyal Order of Moose*, 252 U. S. 411. There a judgment was recovered in Alabama against the defendant for negligently causing the death of plaintiff's intestate in Alabama. Thereafter an action was instituted upon the Alabama judgment in Illinois. The defense pleaded and sustained by the Illinois Court was that under the Illinois statutes no action could be maintained in its courts for damages occasioned by death occurring in another state through negligence whether instituted originally in Illinois or commenced upon a judgment recovered in another state. In reversing, this Court held:

> "In the court below and in the argument before us reliance was placed upon Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92, and language in Wis-

consin *v.* Pelican Ins. Co., 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370, the former as showing that the clause requiring full faith and credit to be given to judgments of other state does not require a state to furnish a court, and the latter as sanctioning an inquiry into the nature of the original cause of action in order to determine the jurisdiction of a court to enforce a foreign judgment founded upon it. But we are of opinion that the conclusion sought to be built upon these premises in the present case cannot be sustained.

"Anglo-American Provision Co. *v.* Davis Provision Co. was a suit by a foreign corporation on a foreign judgment against a foreign corporation. *The decision is sufficiently explained without more by the views about foreign corporations that had prevailed unquestioned since Bank of Augusta* v. *Earle,* 13 Pet. 579, 589-591, 10 L. ed. 303, 308, 309, cited 191 U. S. 375, 48 L. ed. 227, 24 Sup. Ct. Rep. 92. Moreover, no doubt there is truth in the proposition that the Constitution does not require the state to furnish a court. *But it also is true that there are limits to the power of exclusion and to the power to consider the nature of the cause of action before the foreign judgment based upon it is given effect.*"

• • • • • •

"'• • • *it is plain that a state cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent.* • • •'" (Italics ours.)

Nothing said or held in *McKnett* v. *St. Louis & S. F. R. Co.,* 292 U. S. 230, sustains appellees. On the contrary, in that case the Court specifically said that "the power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard

in them is, of course, subject to the restrictions imposed by the Federal Constitution".

In the present instance, New Jersey has no real or substantial interest in the subject matter of the litigation, or proper public policy adverse thereto (*Converse* v. *Hamilton*, 224 U. S. 243). It follows that its refusal to permit enforcement of assessment rights whether by affirmative legislation or by the device of the statute under consideration is invalid under the due process and full faith and credit clauses of the Constitution.

POINT IX.

The judgment below should be reversed and the action remanded to the New Jersey courts for further proceedings in accordance with the provisions of the Constitution of the United States.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1934.

No. 528.

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York, *Appellant,* *vs.* MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, *et al.*	*Appeal from the Court of Errors and Appeals of the State of New Jersey.*

BRIEF ON BEHALF OF DEFENDANTS-APPELLEES, THE BOBDON COMPANY AND HERBERT COOPER.

Statement.

Judgment was entered in the New Jersey Supreme Court on February 14, 1934 in favor of the defendants-appellees, The Bobdon Company (spelled Bobdan in summons, complaint and schedules and throughout the proceedings), and Herbert Cooper. This judgment was affirmed by the Court of Errors and Appeals of New Jersey, September 27, 1934. The defendants-appellees were sued by Joseph A. Broderick, Superintendent of Banks of the State of New York upon the double liability assessed under New York law against them as holders of stock of the Bank of the United States, a banking corporation organized under the laws of the State of New York. The Bobdon Company is alleged to be the owner of 388 shares of the capital stock of said bank and was assessed $9,700.00, the par value of the stock. Herbert Cooper is alleged to be the owner of 60 shares and was assessed $1,500.00, the par value of the stock. The decision of the

New Jersey Supreme Court (opinion by Justice Charles W. Parker) held, in effect, as follows:

(a) That appellant's action at law was barred by Section 94b of the New Jersey Corporation Act.

(b) That the provisions of the said New Jersey statute were not violative of the United States Constitution.

(c) That appellant was entitled to access to the New Jersey courts only through the exercise of comity and in the manner provided in said statute.

Justice Parker, in his opinion (R. 19, bottom), characterizes this action in the following language:

> "This suit is not one suit, but a multiple suit, at law, clearly on behalf of creditors of a corporation, and that a foreign one, to enforce in each case a statutory personal liability of a stockholder. This is exactly what the statute forbids."

From the affirmance of the decision of the New Jersey Supreme Court by the Court of Errors and Appeals of New Jersey, appellant brings this appeal.

POINT I.

The Superintendent of Banks of the State of New York is a mere statutory receiver, does not have title to the assets of the Bank, and has not, as of right, any standing in courts outside of the State of New York.

The Superintendent of Banks of the State of New York is not a judicial officer, but is regarded by the courts of that State as a mere statutory receiver. *Matter of Union Bank*, 204 N. Y. 313, 97 N. E. 737.

The New York statutes as construed by its own courts do not vest title in the Superintendent, either as to assets located in that State or elsewhere. *Yokohama Specie Bank, Ltd.* v. *Chinese Merchants Bank*, 219 App. Div.

256 (1927). This case was submitted to the Court upon an agreed statement of facts. The plaintiff banking corporation was licensed to do business in New York; the Chinese Merchants Bank was likewise licensed to do business there. On June 13, 1924, the Superintendent of Banks of New York took possession of the Chinese Bank's assets. Three days later the Yokohama Bank sued the Chinese Bank in Illinois and levied upon certain assets located there belonging to the Chinese Bank. The Illinois proceedings were discontinued by agreement and the Illinois property brought to New York for determination of the respective rights thereto. The controversy was dismissed for the reason that it turned upon the attitude of the Illinois courts, which was a question of fact impossible to determine in the New York proceeding. In referring to the necessity of a determination in Illinois, the court said, at page 258:

> "The Superintendent of Banks in taking possession of the assets of a bank under the Banking Law is merely a receiver in the nature of a liquidator.
>
> "The corporation is not deprived of its assets and no title is vested in the Superintendent. (Mechanics & Metals Nat. Bank *v.* Banque Industrielle, 205 App. Div. 543.)"

and again, on the same page:

> "The general rule is that a liquidator in one State acquires no title to assets in another State. (Hibernia Nat. Bank *v.* Lacombe, 84 N. Y. 367; Matter of People (City Eq. Fire Ins. Co.), 238 *Id.* 147, 152; Rhawn *v.* Pearce, 110 Ill. 350.) Under exceptional circumstances the courts of this State, while recognizing this rule, have as a matter of comity accorded recognition to a foreign liquidator. (Matter of Waite, 99 N. Y. 433; Wulff *v.* Roseville Trust Co., 164 App. Div. 399.)
>
> "The criterion upon which this submission turns, therefore, is the attitude which would be taken by

the Illinois courts in recognizing the claim of the New York Superintendent of Banks, as a matter not of legal right, but of comity. We could only speculate as to what this attitude would be. Whether the court of Illinois would regard the New York liquidator, the Hongkong liquidator, or either of them, as vested with title to this fund is a question of Illinois law as yet undetermined by the courts of that State. To this court, that is a question of fact."

POINT II.

The Superintendent of Banks of the State of New York may obtain access to the courts of the State of New Jersey only through the exercise of comity.

A Receiver has no extra-territorial jurisdiction or power of official action, and is not entitled, as a matter of right, to sue in a foreign jurisdiction, and refusal of another State to entertain such suit does not amount to a failure to give full faith and credit to the laws and judgments of the State of the appointment, within the meaning of the Federal Constitution.

High, Receivers, §239; *Booth* v. *Clark,* 17 How. 322, 15 L. Ed. 164; *Filkins* v. *Nunnemacher,* 81 Wis. 91, 51 N. W. 79; *Farmers' & M. Ins. Co.* v. *Needles,* 52 Mo. 17; *Brigham* v. *Luddington,* 12 Blatchf. 237; Fed. Cas. No. 1,874; *Hazard* v. *Durant,* 19 Fed. 471.

A Receiver is often permitted, through comity or courtesy of a sister State to maintain an action therein (chiefly in cases where he has title to an asset within that State), but never where the courts of such sister State have declared the maintenance of such an action to be against the public policy of that State. In *Pond* v. *Cook,* 45 Conn. 126, the Court said:

> "Thus it appears that the property was in the possession of the defendant as receiver when it

> came into this State. He was invested with it, and was legitimately performing the duties of his appointment in completing the contract by its use when it was attached by the plaintiff. In these circumstances comity among the States requires that the case should be regarded by our courts precisely as it would have been by the courts of New Jersey if the controversy had arisen there."

The significant feature of the above quotation is that the Receiver was invested with title to the property which he was seeking to recover, which is not so in the case at bar, as the Superintendent of Banks of the State of New York does not have title to the cause of action which he now seeks to enforce in this State.

An exact paralled to the case at bar arose in Tennessee when the New York Superintendent of Banks, suing under the Statute here involved, sought to recover an assessment from a stockholder residing in Tennessee to pay the debts of the bank. The Tennessee Court held that the New York Superintendent of Banks did not possess the legal title to the claim sued on, but only the right to sue and collect, and hence that he could assert such claim only through the exercise of comity. *Van Tuyl v. Carpenter*, (1915) 135 Tenn. 629, 188 S. W. 234. While it may be competent for the State of New York to empower its Superintendent of Banks to sue delinquent resident stockholders in its own courts, it is difficult to see how that State could empower its Superintendent to recover assets located in a sister State of independent sovereignty, unless the State of New York vests in its Superintendent title to property wherever located.

We quote somewhat at length from the opinion of the Supreme Court of Tennessee in the Van Tuyl case, as follows:

> "The right of action, if any, is not in the bank but in the Superintendent of Banks. His right is

rooted in the statute, but that statute gives him no right to sue in a foreign State. Such vestiture has been held, by the highest authority, an essential prerequisite. Hale *v.* Allinson, 188 U. S. 65, 23 Sup. Ct. 244, 47 L. Ed. 388; Great Western Min. & Mfg. Co. *v.* Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163; Bernheimer *v.* Converse, 206 U. S. 534, 27 Sup. Ct. 755, 51 L. Ed. 1176; Converse *v.* Minn. Thresher Mfg. Co., 212 U. S. 567, 29 Sup. Ct. 691, 53 L. Ed. 654; Converse *v.* Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913 D, 1292; Selig *v.* Hamilton, 234 U. S. 652, 34 Sup. Ct. 926, 58 L. Ed. 1518. And see Irvine *v.* Elliott (D. C.), 203 Fed. 82. * * *."

* * * * * * * * *

"The rule is general that a mere Chancery Receiver has no right to sue in a foreign State and can assert such claims as he has only through the exercise of comity on the part of the State in which he seeks to exercise his functions. Hardee *v.* Wilson, 129 Tenn. 511, 167 S. W. 475, Ann. Cas. 1916 A, 94; Booth *v.* Clark, 17 How. 322, 15 L. Ed. 164; Great Western M. & M. Co. *v.* Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163; Converse *v.* Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, and the same rule would necessarily attribute the duties of a receiver to an officer of a foreign State claiming authority under a legislative Act of such foreign State, since foreign laws can have no extra territorial efficacy, save in those instances which are governed by the 'full faith and credit' clause of our Federal Constitution, and the case supposed is not one of them."

* * * * * * * * *

"However, if the Receiver has the legal title to the claim sued on, he has generally a right to sue in the foreign State (Hardee *v.* Wilson, *supra*), but the New York cases hold that the Superintendent of Banks does not possess the legal title to such

assets as are here sued on, but only the right to sue and collect. La Fayette Trust Co. *v.* Higginbotham, 136 App. Div. 747, 121 N. Y. Supp. 490; Matter of Union Bank of Brooklyn, 204 N. Y. 313, 97 N. E. 737."

* * * * * * * * *

"We may add that even if it appeared that the foreign Superintendent of Banks, or statutory receiver, had either the title to the assets, or power given him by the statute of his State, to sue in a foreign jurisdiction, or both, we do not see how he could, in a foreign jurisdiction, sue stockholders on their double liability, without a previous judicial ascertainment, in his own State, in a suit brought against the corporation, showing debts and assets and the necessity of a call on stockholders. The possession of title would be of no importance unless the amount due could be ascertained. Likewise, the right to sue in a foreign State could have no extra-territorial effect, save as an incident to a judicial proceeding in the receiver's own State, purporting to confer that right under statutory authority; it would then be operative, if at all, under the full faith and credit clause of the Federal Constitution."

* * * * * * * * *

"In writing this opinion we have assumed, as the clear weight of authority indicates, that stockholders who subscribe for stock in a corporation, in a State which at the time has a statute providing for the double liability referred to, become contractually bound to meet and carry the liability imposed by the statute; that the duty imposed is governed by the law of contract, and the payment required cannot be treated as a penalty. Whitman *v.* Oxford Natl. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587; Ferguson *v.* Sherman, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622; Flash *v.* Conn., 16 Fla. 428, 26 Am. Rep. 721; Bell *v.* Farwell, 176 Ill. 589, 52 N. E. 346, 42 L. R. A. 808, 68 Am. St. Rep. 194;

Stecker *v.* Davidson, 74 Kan. 214, 86 Pac. 136, 118 Am. St. Rep. 315; Pfaff *v.* Gruen, 92 Mo. App. 560, 69 S. W. 405; Hancock Natl. Bank *v.* Ellis, 172 Mass. 39, 51 N. E. 207, 42 L. R. A. 396, 70 Am. St. Rep. 232. Perhaps a better statement of the principle would be that the liability arises out of the statute which imposes it, but the statute becomes binding on the stockholder through his subscription, whereby he places himself in such relation to it, as that he is bound by its terms, and so may be said to agree by implication that he will pay when the conditions of his liability for a specified amount are lawfully made to appear. Christopher *v.* Norvell, 201 U. S. 216, 224, *et seq.;* 26 Sup. Ct. 502, 50 L. Ed. 732, 5 Am. Cas. 740; Kulp *v.* Fleming, 65 Ohio St. 321, 62 N. E. 334, 87 Am. St. Rep. 611. But if the method of ascertaining such liability is such as cannot be recognized in a foreign State because against its public policy, then such liability cannot be consistently recognized in that State. Therefore, on the grounds we have stated, such liability cannot be enforced here merely on an assessment made by the Superintendent of Banks of the State of New York; and the judgment dismissing the bill must be affirmed." (188 S. W. 237, 238.)

Appellant has listed many cases from other states in which a liquidator, receiver or similar officer has been permitted to maintain an action in a foreign state, either upon a similar liability or upon the identical liability in the instances where Superintendents of Banks have sued in other states in the Union. (See Appellant's Brief p. 42, and cases there cited.) We submit that these cases can be distinguished upon the ground that there is no vesting of title to the cause of action in the liquidating officer in this case, namely, the Superintendent of Banks of the State of New York, and that no public policy, as indicated by statute in the State of New Jersey, confronted the Receiver in those cases. Plaintiff relies on

Converse v. *Hamilton*, 224 U. S. 243. In that case the Receiver, whom the Wisconsin courts held could not sue in that State, had been appointed by the Minnesota courts in an action in which the assets and liabilities of the insolvent corporation had been marshalled, the insolvency determined, the assessment against stockholders, both resident and non-resident, fixed, and the Receiver expressly empowered to sue stockholders in Minnesota and elsewhere. These things were adjudicated in Minnesota and found expression in the order made by its courts. This court held that the orders evidencing such adjudication must be respected in Minnesota in accordance with the full faith and credit clause of the Constitution. In the case at bar there has been no judicial determination of insolvency, no assessment by any court against the stockholders sought to be sued, and no judgment or order of any court to serve as a basis for invoking the aid of the full faith and credit clause. This court also held in *Converse* v. *Hamilton, supra*, that the Receiver "became a quasi-assignee and representative of the creditors, *was invested with their rights of action* against the stockholders," and further the Receiver was "clothed with *adequate title* for the occasion"; but that holding was only necessary in distinguishing that case from *Hale* v. *Allinson*, 188 U. S. 56, and *Finney* v. *Guy*, 189 U. S. 335, in which it had been held that such a Receiver appointed under previous Minnesota statutes was not entitled to sue. The Superintendent of Banks of New York as shown in Point I of this brief does not have such title.

The same reasoning distinguishes the cases *Selig* v. *Hamilton* (Appellant's Brief p. 66), *Bernheimer* v. *Converse* (Appellant's Brief p. 60) and *Converse* v. *Aetna National Bank* (Appellant's Brief p. 63), which deal with the same statute which was involved in the above case.

We submit that whether or not a Receiver having title to a cause of action (which the New York Superintendent

of Banks does not have) can enforce his obligation in any other state, has no bearing upon the enforceability of this assessment by appellant in the State of New Jersey, and that the argument of appellant from these cases from other states is not applicable or pertinent to the issues here involved. That the action here brought does offend the public policy of the State of New Jersey (as evidenced by its refusal to create similar liability on the stockholders of its State banks and by the enactment of Section 94b of the Corporation Act, hereinafter more particularly set forth) which provides for the enforcement of such double assessment liabilities, only by the equity suit provided in the statute, requires no argument.

This Court said, in *Bond* v. *Hume*, 243 U. S. 15, at page 22, 61 L. Ed. 565, at page 568:

> "And finally, it is certain that, as it is *peculiarly within the province of the lawmaking power to define the public policy of the state,* where that power has been exerted in such a way as to manifest that a violation of public policy would result from the enforcement of a foreign contract validly entered into under a foreign law, comity will yield to the manifestation of the legislative will and enforcement will not be permitted." (Italics ours.)

Had the policy of this state been to prohibit enforcement of such liability in any court and had there been eliminated from Section 94b that portion permitting an equity action, the statute would still be constitutional, for *a state may constitutionally prohibit any suit in its courts to enforce a cause of action arising under the statutes of a sister state,* provided it does not thereby discriminate against citizens of other states. *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 52 L. Ed. 143, is the leading case. Suit was brought in Ohio on a death action arising under a Pennsylvania statute, the deceased having been a citizen of Pennsylvania. Judgment for the plaintiff in the trial court was reversed by the Ohio Supreme Court

because an Ohio statute provided that recovery could be had under the statute creating a cause of action for a wrongful death in foreign states only when the deceased was a citizen of Ohio. This Court affirmed the action of the Ohio Supreme Court. After stating the rule of the privileges and immunities clause, the Court said on page 146 of L. Ed.:

> "But, subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. * * * But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states."

It was held that the Ohio statute was constitutional, for it did not discriminate between plaintiffs or beneficiaries, but as to the *subject matter of the suit.* The Court said that the plaintiff has "been denied access to the Ohio courts * * * because the cause of action which she presents is not cognizable in those courts."

This Court has held in *Finney* v. *Guy*, 189 U. S. 335, that "whether a state court should permit an action to be maintained therein on the principle of comity between the states is a question exclusively for the courts of that state to decide," to which it may here be added that the legislature in the present instance undertook to decide that question itself.

POINT III.

The Courts of Law of the State of New Jersey are not the proper forum for the enforcement of this assessment.

Appellant has relied upon many cases in this Court and the lower Federal Courts in support of his contention that the action upon the stock assessment should be brought in a law court. These cases, arising under the National Bank Act, while construing an act similar in intent and form, cannot be said to be dispositive of the matters here involved. The Federal law is binding upon the courts of the several states wherever the power of Congress to enact legislation is exercised within its constitutional limits. Neither the courts of New Jersey by their decisions, nor the legislature by its enactments, could limit the force of the National Bank Act. The fact that the Comptroller by the provisions of the National Bank Act has been given wide discretionary powers as to the determination of assessments, and his receivers wide authority as to the enforcement of the assessments, when lawfully made, is no basis for the conclusion that the Superintendent of Banks of New York State has similar powers and prerogatives, and that the Statute of New York State dealing with similar subject matter is entitled to the same weight in New Jersey or any other state. It is conceded that Section 94b of the Corporation Act, could not, even if it sought to limit the power the Comptroller of the Currency, be effective for that purpose. The Act, by its very terms does not seek to limit the Comptroller's power, as it only regulates the enforcement of a statutory personal liability created by or arising from the statutes or laws *of another state or foreign country*.

The fallacy in appellant's argument that the decisions in the Federal Courts construing the provisions of the National Bank Act are of prime authority on the questions here involved is that the State of New York is not the

Federal Government, and that the statutes of New York do not supersede the statutes of New Jersey when they may conflict. The Federal cases to the effect that the action under the National Bank Act double liability provisions is at law are numerous and conclusive. As above stated, Section 94b of the Corporation Act does not seek to limit any action brought under the National Bank Act to the jurisdiction of the Court of Chancery, nor would its attempt so to do be effective. The argument that the rule of the Federal Courts, applicable to assessments levied by the Comptroller of the Currency applies and controls the assessment enforcement through the office of the Superintendent of Banks of the State of New York is a *non sequitur*.

As shown under Point II, *supra*, the State of New Jersey could have closed its courts to the Commissioner of Banking and Insurance of the State of New York in attempting to enforce stockholders' liabilities. However, the legislature has seen fit to give a remedy by a suit in the nature of an equitable accounting in the Court of Chancery. The appellant must be content therewith. The fact that in the State of New York the Commissioner is authorized by a particular statute to maintain his action in the law courts, has no effect upon the determination of another state of its policy with regard to such action. The State of New Jersey is not obliged to give the New York Superintendent of Banks the same mode of procedure under which he may sue in his home state. The power to exclude him from its courts *a fortiori* includes the power to designate a particular tribunal before which the action must be brought and to circumscribe the procedure by such means as the State of New Jersey deems necessary for the orderly procedure of the administration of justice in its courts.

Under Point II of appellant's brief (p. 82), several New Jersey cases are cited as authority for the maintenance of

the present action at law and allegedly holding that a Court of Chancery does not have jurisdiction in this type of case. We submit that appellant is confusing the liability on an unpaid stock subscription with the statutory double liability. The case of *McDermott, Receiver,* v. *Woodhouse,* 87 N. J. Eq. 615, is concerned with the question of the enforcement of a stockholder's liability on unpaid stock, and not with the question of a statutory personal liability on stock already fully paid. It is conceded that an action for the balance of the subscription price of stock may be maintained at law in New Jersey. This case does not deal with the right of a Receiver to sue in another jurisdiction, and is not pertinent.

The case of *Chicago Title & Trust Co.* v. *Young,* 90 N. J. Eq. 27, was an action brought to levy an assessment on behalf of creditors upon the holders of stock of an Illinois corporation for the unpaid subscription price of said stock, and is not applicable for that reason. The case of *Graham* v. *Fleissner,* 107 N. J. L. 278, was also an action against stockholders for the purpose of enforcing the "Trust Fund" liability against individual shareholders. The defendant sought to bar that action under the authority of Section 94b of the Corporation Act. In Justice Parker's opinion, speaking for the New Jersey Court of Errors and Appeals, he said:

> "We do not take this view of the matter; on the contrary, we agree with counsel for respondent that the phrase 'statutory personal liability' in the statute means personal liability imposed by statute *extra* the common law liability to make up a deficit of par value, i. e., the so-called 'trust fund' theory of capital stock" (107 N. J. L., at p. 280).

This case is also not applicable.

POINT IV.

Section 94b of the Corporation Act of the State of New Jersey does not violate the Constitution of the United States or amendments thereof.

The statute here in question, which bars the instant action, provides as follows:

> "No action or proceeding shall be maintained in any court of law of this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country, and no pending or future action or proceedings to enforce any such statutory personal liability shall be maintained in any court of this state other than in a nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties" (P. L. 1897, p. 125; 2 Comp. Stat. 1656).

The above quoted statute has been passed upon in two instances. In *Western National Bank* v. *Reckless*, 96 Fed. 70, it was held that the statute was not effective to bar a suit for the enforcement of stock assessment liability where the liability sought to be so enforced arose before the passage of the Act. The Act was passed before the organization of the Bank of the United States and for that reason the above case is not pertinent. In *Cochrane* v. *Morris*, 10 N. J. Misc. 82, the statute was held to be a bar to just such a suit as is here brought in that case that of a liquidator of a Florida bank attempting to recover

from a stockholder, a resident of New Jersey, a one hundred per cent. statutory assessment.

This court stated in the case of *Missouri* v. *Lewis*, 101 U. S. 22:

> "It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter, and amount, and the finality and effect of their decisions, provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress. The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by any thing in the Constitution of the United States, including the amendments thereto."

A. The New Jersey statute is not violative of Art. IV, Section 1 of the Constitution of the United States in denying full faith and credit to the public acts, records and judicial proceedings of another state. It has gener-

ally been held by the courts that the full faith and credit clause is not jurisdictional but merely provides a rule of evidence. *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373, 48 L. Ed. 225; and cases cited therein; *Clifford* v. *Williams*, 131 Fed. 100; *Israel* v. *Israel*, 130 Fed. 237. In *Anglo-American Provision Co.* v. *Davis Provision Co., supra*, Mr. Justice Holmes, speaking for this Court, said,

> "• • • The parties are both Illinois corporations, and the plaintiff-in-error brought suit in the New York Supreme Court upon an Illinois judgment. By the New York Code of Civil Procedure, section 1780, it is provided that 'an action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only: • • • 3. Where the cause of action arose within the state, etc.' • • •
>
> "The state court decides that the cause of action did not arise within the state in the sense of the words of the Code, and, of course, we follow its construction, subject to the inquiry whether the statute as construed is consistent with the Constitution of the United States • • •.
>
> "We are of opinion that the section of the Code as construed is not unconstitutional. The precise point has not been decided by this court, but it has been laid down in cases which raise greater difficulties than the present, that this provision of the constitution establishes a rule of evidence rather than of jurisdiction. Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 291, 32 L. Ed. 239, 243, 8 Sup. Ct. Rep. 1370; Andrews *v.* Andrews, 188 U. S. 14, 36, 47 L. Ed. 366, 371, 23 Sup. Ct. Rep. 237. The Constitution does not require the State of New York to give jurisdiction to the supreme court against its will. If the plaintiff can find a court into which it has a right to come, then the effect of the judgment

> is fixed by the Constitution and the act in pursuance of it which Congress has passed. Rev. Stat. section 905 (U. S. Comp. Stat. 1901, p. 677). But the Constitution does not require the state to provide such a court * * *."

It is submitted that under the authority of the above case and the cases therein cited, the legislature of the State of New Jersey would have had the power to enact legislation prohibiting the enforcement of this assessment in its courts and that, therefore, it was within its powers in providing a remedy, whether the same be reasonable or otherwise, in which manner alone this assessment can be enforced. We have heretofore, under Point II, shown that the Commissioner of Banking and Insurance of the State of New York may obtain access to New Jersey courts only through the exercise of comity. The Commissioner of Banking and Insurance of the State of New York has no right to insist upon the same method of procedure in this State as is afforded him in his home State, but must be content, under the cases above cited, with the remedy which the legislature and the courts of the State of New Jersey have seen fit, under their policy, to extend to him.

It is important to note as we have stated above that in this case there has been no judicial proceeding of any kind in the State of New York by virtue of which the relation between the Superintendent of Banks and the Bank of the United States was fixed. Nor has there been any judicial determination of insolvency or of the respective rights of creditors and stockholders. There is no judgment or judicial records upon which the Superintendent of Banks can rely in invoking the full faith and credit clause.

No case in which that clause has been held controlling has been found where such a state of facts existed. See

McNnett v. *St. Louis & S. F. R. Co.*, 292 U. S. 230, 78 L. Ed. 1227. Mr. Justice Brandeis said (78 L. Ed. 1228, 1229):

"'The plaintiff contends that by refusing to entertain jurisdiction, the state court has denied him a right expressly conferred by Congress and guaranteed by the Federal Constitution. The defendant insists that the statute as construed is consistent with the Federal Constitution; since a state may determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them; *Angelo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373, 48 L. Ed. 225, 24 S. Ct. 92; *Chambers* v. *Baltimore & O. R. Co.*, 207 U. S. 142, 148, 149, 52 L. Ed. 143, 146, 147, 28 S. Ct. 34, and the extent to which its courts shall become a forum for the trial of transitory causes of action arising in other states. *Missouri P. R. Co.* v. *Clarendon Boat Oar Co.*, 257 U. S. 533, 66 L. Ed. 354, 42 S. Ct. 210; *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377, 73 L. Ed. 747, 49 S. Ct. 355.'

. . . . . .

"'The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution. The privileges and immunities clause requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens. *Corfield* v. *Coryell*, 4 Wash. C. C. 371, 381, Fed. Cas. No. 3,230. Compare *Canadian Northern R. Co.* v. *Eggen*, 252 U. S. 553, 64 L. Ed. 713, 40 S. Ct. 402. The full faith and credit clause requires a state court to take jurisdiction of an action to enforce a judgment recovered in another state, although it might have refused to entertain a suit on the original cause of action as obnoxious to its public policy.'" (Citing cases.)

It would be most unreasonable and unjust for this court to hold that a state is compelled by the full faith and credit clause of the Constitution to give effect to the *ex parte* determination of an administrative officer of another state which has no judicial sanction and from which no appeal lies, the effect of which is to saddle a liability on its citizens contrary to the public policy of the state as expressed in its statutes.

B. Section 94b of the Corporation Act of the State of New Jersey is not violative of the provisions of Art. XIV of the amendments to the Constitution of the United States.

Due process of law under the United States Supreme Court decisions does not mean any particular form of process applicable to all cases in all jurisdictions, but means any reasonable process under which a litigant may have a fair trial in a court of justice. This is summarized in appropriate language in the case of *Davidson v. The Board of Administrators*, 24 L. Ed. 616, 96 U. S. 97, where the court said,

(24 L. Ed. at page 620):

> "It is not possible to hold that where, by the laws of the State, the party aggrieved has, as regards the issues affecting his property, a fair trial in a Court of Justice, according to the modes of proceeding applicable to such case that he has been deprived of that property without due process of law" (Citing further cases).

It is well established that whether or not a right exists depends upon the law of the state where it was created. But the remedy for enforcing any such right depends upon the law of the state where it is sought to be enforced.

De La Vega v. *Vianna*, 1 Barn. & Ad. 284, (K. B. 1830); *Herrick* v. *Minneapolis & St. L. R. Co.*, 31 Minn. 11, 47

Am. Rep. 771, 16 N. W. 413; *Northern P. R. Co.* v. *Babcock*, 154 U. S. 190, 197, 38 L. Ed. 958, 960, 14 Sup. Ct. Rep. 978; *Marshall* v. *Sherman*, 148 N. Y. 9, 34 L. R. A. 757, 51 Am. St. Rep. 654, 42 N. E. 419; *Leucke* v. *Tredway*, 45 Mo. App. 507.

There is no vested right in the special remedial procedure outlined in Section 80 of the New York banking law. *Schriver* v. *Woodbine Savings Bank*, 285 U. S. 467, 479, 76 L. Ed. 884, 892; *Howarth* v. *Angle*, 162 N. Y. 179, 188. These cases recognize that where a statute creates a liability of stockholders to assessment, although the liability is transitory, the special statutory forms of remedy provided by such statute may not be resorted to elsewhere. Section 80 of the banking law of New York is such a special form of remedy upon the obligation created by Section 120 of that Act and by the New York Constitution. The principle declared in the cases last cited is persuasive of appellees' contention that in seeking to enforce this liability outside of New York, appellant must *accept* whatever remedies are provided by the forum, whether reasonable or otherwise.

As was held in *Louisville & Nashville R. R. Co.* v. *Schmidt*, 177 U. S. 230, 44 L. Ed. 747:

> "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts, or regulate practice therein."

We submit, as hereinbefore stated under Point III that the State of New Jersey is not obliged to give the New York Superintendent of Banks the same form of due process which he may enjoy in his home state. It is within the province of the legislature of the State of New Jersey to designate the tribunal within which he must sue and the regulations circumscribing his procedure may be estab-

lished as those which the legislature deems necessary for the orderly procedure of the administration of justice in its courts.

The statute of New Jersey, even though it be construed as prohibiting plaintiff's action in that state, does not destroy plaintiff's property right or deprive him of his property because it affects the remedy and not the property right. The State of New Jersey cannot add to or detract from the right or property created in the plaintiff by the laws of the State of New York. Plaintiff's property, if any, remains undisturbed by any statute of the State of New Jersey. Since that State is without power to deprive him of his property, it is without the power to deprive him of his property without due process of law. See *Blake* v. *McClung*, 172 U. S. 239, 259, 260.

The plaintiff states that because of the number of stockholders and creditors of the Bank of the United States, it is impossible for him to proceed under the New Jersey statute. We doubt if there is any real impossibility, but even if there were it would be no ground for holding the statute invalid. It was adopted long before the Bank of the United States was organized and should not be considered in the light of any particular case which it affects. Statutes requiring judicial accountings are neither unusual or unique and the size of the litigation affected by such a statute should not be controlling of the constitutional questions involved.

POINT V.

The entry of a judgment, final in form, by the New Jersey Supreme Court was proper.

Appellant argues, under Point III of his brief (p. 83) that in any event a *final* judgment should not have been entered in the court of original jurisdiction. We submit that appellant is barred from raising this objection. Justice

Parker's opinion, which was delivered prior to the entry of the order, concludes:

> "As I view the matter now, it would seem that there should be a judgment for the moving defendants subject of course to appeal, and without prejudice to the filing of a bill in equity on the lines laid down in section 94-b of the Corporation Act. The matter might be transferred to the Court of Chancery, but the complaint would have to be reframed, I think in any event.
>
> "I will hear counsel on the first convenient motion day as to settlement of these details" (R. 21).

Pursuant to his statement, counsel were heard on a motion day following the rendering of the opinion. At that time, Justice Parker asked appellant's counsel whether he desired to amend or reframe his complaint so that the matter could be transferred to the Court of Chancery for proceedings in accordance with Section 94b of the Corporation Act. Appellant's counsel, in open court, stated that appellant would stand or fall on the complaint as it was before Justice Parker. The order striking the complaint recites the failure to make such an application.

> "ORDERED, that plaintiff's complaint be and the same hereby is struck out as to the above named defendants, and it appearing that no application is made by plaintiff to amend said complaint, it is further * * *" (R. 22).

Under these facts, appellant has no standing to urge now that a final judgment should not have been entered. Whether or not his complaint may be reframed and an action instituted in Chancery of New Jersey for the enforcement of the obligation is a matter of local procedure and is not presently before this Court.

CONCLUSION.

It is respectfully submitted that the judgment of the New Jersey Supreme Court, as affirmed by the Court of Errors and Appeals of New Jersey, should be in all respects affirmed.

J. H. HARRISON,
Of Counsel with Defendants-Appellees,
The Bobdon Company, a corporation,
and Herbert Cooper.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 528

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York,

Appellant,

v.

MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, *et al.*

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR CERTAIN APPELLEES

DAVID FRIEDENBERG,
HOWARD EWART,
BENJAMIN GROSS,
JAMES MERCER DAVIS,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 528.

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York, Appellant, *v.* MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, *et als.*	Appeal from the Court of Errors and Appeals of the State of New Jersey.

BRIEF FOR CERTAIN APPELLEES.

Statement.

This brief is filed in behalf of the following appellees: Charles P. Anderson, Stephen R. Applegate, Hannah C. Bailey, Mrs. Maude A. Benkert, James Mercer Davis, Alfred R. M. Diggles, Howard Ewart, Herman Geismar, Paul S. Goble (M. D.), Emanuel Gross, William J. Gruler, Clair MacFarland, Hamilton G. Pedrick, Andrew Schwarz, Raymond C. Staples, Frank W. Sutton, Jr., Mrs. Mary A. Van Nostrand, Charles N. Warner, Zulena Cook Woodward, Arney-Sutton-Gruler Co., The Farg Co., Inc., Sutton Brothers Co. and Toms River Amusement Co.

The statement of the case contained in appellant's brief and headed "Statement", "The Complaint" and

"Proceedings Below" requires no amplification or correction, except that the appellant failed to state, in mentioning the order for judgment entered in this cause in the New Jersey Supreme Court, that such order for judgment contained a recital that it appeared that no application was made by plaintiff to amend said complaint. The material portion of said order is as follows:

> "Ordered, that plaintiff's complaint be and the same hereby is struck out as to the above named defendants, and it appearing that no application is made by plaintiff to amend said complaint, it is further
>
> Ordered, that judgment final be entered in favor of each of said defendants and against said plaintiff, with costs to be taxed under the direction of this Court.
>
> Let this rule be entered.
>
> CHARLES W. PARKER,
> Supreme Court Justice."

(R., p. 22).

POINT I.

Section 94B of the New Jersey Corporation Act, and the judgment of the court below based thereon, do not violate the full faith and credit clause of the Constitution of the United States (Article IV, Section I).

The section of the Act in question reads as follows:

> "No action or proceeding shall be maintained in any court of law of this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be

> deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country, and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in a nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties (P. L. 1897, p. 125)."

This section applies to the action presently before the court, as was held below by the New Jersey Court of Errors and Appeals, and in *Cochrane* v. *Morris,* 10 N. J. Misc. 82, 157 Atl. 652. It is argued in the appellant's brief that the New Jersey statute was not intended to apply to cases of this sort, but in view of the decision of the highest court of the State of New Jersey to the contrary, the question is no longer open.

This statute declares the public policy of the State of New Jersey. There is no similar provision for double liability of stockholders in banking corporations organized under the laws of that State, and, apparently realizing the harshness of the statutory remedy in other States, the New Jersey legislature has declared, in passing the above statute, that the only remedy afforded to enforce such statutory liability by the courts of New Jersey should be an equitable accounting action, in which the necessary parties shall be as enumerated therein. The statute, Section 94b, goes to the jurisdiction of the courts of New Jersey, which State retains the ancient distinction between the courts of law and of Chancery. See New Jersey Constitution, Article VI, Section I, which reads as follows:

> "1. JUDICIARY.—The judicial power shall be vested in a court of errors and appeals in the last resort

> in all causes, as heretofore; a court for the trial of impeachments; a court of chancery; a prerogative court; a supreme court; circuit courts, and such inferior courts as now exist and as may be hereafter ordained and established by law; which inferior courts the legislature may alter or abolish, as the public good shall require."

Thus the New Jersey Supreme Court below was incapable of entertaining the plaintiff's suit.

The Constitutional provision upon which the appellant relies reads as follows:

> "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The appellant's point is, that the State of New Jersey, in refusing to permit an action in the nature of the present one and requiring the enforcement of liability in the equity court, as specified in the section, denies to the constitution and banking laws of the State of New York the full faith and credit to which they are entitled under the Federal Constitution. Appellant also maintains that full faith and credit must be given under the Constitutional provision to the levy of the one hundred percent. (100%) assessment upon the stockholders of the Bank of United States by the appellant as Superintendent of Banks in New York. It is submitted that although the New York Constitution and Banking Laws are concededly "public acts" within the meaning of Article IV, Section 1, the conduct of the Superintendent of Banks is not entitled to full faith and credit by virtue of that section.

A—The assessment by the Superintendent of Banks of the State of New York is not conclusive under the law of that State.

The appellant, at great length, argues that, under the law of New York, in that State the determination of the Superintendent of Banks is conclusive in the absence of fraud, bad faith or clear error of law. It is respectfully submitted that the New York Court of Appeals has never so decided, and it cannot be said that the decisions of the lower courts in that State ever established a rule of law for New York according conclusive effect to the Superintendent's determinations. Although various New York opinions have referred to the derivation of the present banking law of that State (*i. e.*, Sections 80 and 120) from the National Banking Act (*Van Tuyl* v. *Scharmann*, 208 N. Y. 53; *Matter of Union Bank*, 176 N. Y. App. Div. 477, 163 N. Y. Supp. 485; *Broderick* v. *Aaron, et al.*, 151 N. Y. Misc. 516, 272 N. Y. Supp. 219), the statement that the determination of the Superintendent of Banks as to the necessity for and amount of the assessment, is conclusive in the absence of fraud, illegality and bad faith, has been made only in the *nisi prius* decision of *Broderick* v. *Adamson, et al.*, 148 N. Y. Misc. 353, 265 N. Y. Supp. 804. The language of that decision quoted on page 28 of appellant's brief is confessedly merely dictum. *Broderick* v. *American General Corporation*, 71 Fed. (2nd) 864, simply accepts Justice LYDON's dictum in the Adamson case, *supra*, and follows it.

On the other hand, Section 80 of the New York Banking law gives to the Superintendent's certificate the weight of "presumptive evidence" merely, and, as remarked in *Broderick* v. *McGuire, et al.*, 119 Conn. 83, 174 Atl. 314: "The construction (*i. e.*, conclusive effect) thus placed upon the provision in question goes far be-

yond any judicial interpretation of the words 'presumptive evidence' we have been able to find, *People* v. *Deluce*, 237 Ill. 541, 547, 86 N. E. 1080; *McGinty* v. *Brotherhood of Trainmen*, 166 Wisc. 83, 91, 164 N. W. 249; *State* v. *Simon*, 163 Minn. 317, 203 N. W. 989; *Fightmaster* v. *Mode*, 31 Ohio App. 273, 287, 167 N. E. 407; *State* v. *Intoxicating Liquors*, 80 Me. 57, 61, 12 A. 794."

The opinion in the McGuire case, *supra*, also reads:

> "Certainly the New York decisions in which the effect of the clause of the statute in question has been directly involved do not authoritatively construe it as making the certificate of the superintendent conclusive as to the necessity of the making of an assessment and as to its amount, but rather the contrary. Our conclusion is that the certificate of the superintendent of banks is made by the statute at most evidence of the necessity of the assessment and of its amount and that in an action to enforce an assessment made by him these questions present issues for the determination of the court."

B—The assessment upon the stockholders made by the Superintendent of Banks is not a "public act" within the meaning of the Constitutional provision.

The appellant's levy of the assessment is termed a "public act" at various places in appellant's brief. Although it is undoubtedly an *official* act of Mr. Broderick, it is not a *public* act within the full faith and credit clause of the Constitution. By the term "public acts," the Constitutional provision (Article IV, Section 1) obviously means only "statutes", *i. e.*, acts of the legislature. This is apparent from the law which Congress enacted on May 26th, 1790, pursuant to the power given it by Article IV, Section 1, to "prescribe by general laws the manner in which such acts, records and proceedings shall be proved, and the effect thereof." The said statute reads as follows:

> "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken". (Act, May 26, 1790, C. 11, 1 Stat. 122; R. S. Section 905, U. S. C. A. Title 28, Sec. 687).

Of course, the appellant does not sustain this misnomer of the assessment levy by any citation of authority. In *Crippin, Lawrence & Co.* v. *Laighton,* 69 N. H. 540, 44 Atl. 538, 641, 46 L. R. A. 467, Chief Justice BLODGETT of the New Hampshire Supreme Court, after quoting the full faith and credit clause and the act of Congress of 1790, said:

> "Nor, so far as we have been able to ascertain, is there a word to be found touching their meaning (*i. e.,* the term 'public acts'), or relating to the power of Congress to prescribe their effect, in any judgment of the United States Supreme Court. Presumably, however, the words 'public acts' mean 'public statutes', and the inference is strengthened by the first clause of the statute above cited."

The Constitutional clause, when it originated in the Committee of Detail of the Constitutional Convention, read:

> "Full faith and credit shall be given in each state to the acts of the legislature and to the records and judicial proceedings of the courts and magistrates

of every other state". (Story on Constitution, 2nd edition, vol. 2, p. 172).

And it is only reasonable to assume that the intention of the Convention was to mean "legislative acts" by the term "public acts." Concededly, the Constitution and Banking Laws of the State of New York upon which the appellant founds his alleged cause of action are "public acts" within the meaning of the Constitutional provision (*Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145 at 154 and 155).

C—The assessment upon the stockholders is not a judicial proceeding within the full faith and credit clause.

Nor is the administrative and *ex parte* determination by the plaintiff as to the necessity and amount of the assessment against the defendants and his subsequent levy of the assessment, although "quasi judicial," a "judicial proceeding" within the meaning of the Constitutional provision. The appellant concedes this, necessarily, under *Matter of Union Bank,* 176 N. Y. App. Div. 477, 163 N. Y. Supp. 485; *Isaac* v. *Marcus,* 258 N. Y. 257, 179 N. E. 487; *Bushnell* v. *Leland,* 164 U. S. 684; and *Ex Parte Chetwood,* 165 U. S. 443.

D—The National Banking assessment cases are not in point.

The array of Federal cases set out in the appellant's brief, such as *Kennedy* v. *Gibson,* 75 U. S. 476; *Casey* v. *Galli,* 94 U. S. 673; *Germania Bank* v. *Case,* 99 U. S. 628; *Studebaker* v. *Perry,* 184 U. S. 258; *Dewcese* v. *Smith,* 106 Fed. 438; affirmed *sub nom Smith* v. *Brown,* 187 U. S. 637 (see appellant's brief, pp. 21 to 24), holding that the determinations of the Comptroller of Currency in assessing stockholders under the National Bank-

ing Act are conclusive and not subject to collateral attack, has no bearing on the effect of the determinations of the New York Superintendent of Banks, since the New York statute differs from the act of Congress in question. The conclusive effect given by the Federal cases to the determination of the Comptroller of Currency depends upon the presumption of good faith and regularity attending the performance of official acts and not upon any particular provisions of the National Banking Act. But the Legislature of the State of New York has seen fit to alter this common-law rule as applied to its Superintendent of Banks by making his certificate merely "presumptive evidence" of the necessity for, and the amount of, the assessment.

Said cases are further irrelevant to the argument of this cause, in that the assessments under the ~~New York~~ National Banking Act were not considered under the full faith and credit clause. The Federal statutes, and the acts done thereunder by Federal officers, by virtue of the supremacy clause of the United States Constitution (Article VI, Sec. 2), become part of the municipal law of every state in the Union. Hence, the statement of the effect of the assessments by the Comptroller of Currency throughout the United States is no more cogent an argument that the assessment herein is entitled to full faith and credit in the State of New Jersey than the declaration in *Broderick* v. *Adamson*, 148 N. Y. Misc. 353, 265 N. Y. Supp. 804 at 822, of the effect in New York of the Bank Superintendent's decisions.

E—The full faith and credit clause does not require a State to provide a court and method of enforcement of judgments of sister States.

Under the constitutional provision and the Congressional Act of 1790, *supra*, this court has, on numerous occasions, held that when a judgment of one State is sued

upon in another State, it has the same effect in the latter State as it had in the State in which it was obtained. *McElmoyle* v. *Cohen*, 13 Peters 312; *Bigelow* v. *Old Dominion Copper Mining &c. Co.*, 225 U. S. 111; *Hancock National Bank* v. *Farnum*, 176 U. S. 640; *Roche* v. *McDonald*, 275 U. S. 449. However, even as to the enforcement of judgments, there are definite limitations, and in many cases the sister State is not required by the Constitutional provisions and the statute to enforce the judgment of another State. Common examples are: Where the judgment is upon a penal statute (*Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265); where a decree of divorce has been rendered, purporting to dissolve a marriage the parties to which were domiciled in one State, for a cause arising in the State of the marital domicile, but not a cause for divorce in that State (*Andrews* v. *Andrews*, 188 U. S. 14); where the judgment was rendered by a court not having jurisdiction of the cause of action or of the parties (*Pennoyer* v. *Neff*, 95 U. S. 714). So, an action on the judgment of one State may be barred by the expiration of the statute of limitations of the State within which suit upon the judgment is brought. *Alabama State Bank* v. *Dalton*, 9 How. 522.

It has frequently been stated that the full faith and credit clause is not jurisdictional, but merely provides a rule of evidence. *McElmoyle* v. *Cohen*, 13 Peters, 312; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373; *Clifford* v. *Williams*, 131 Fed. 100; *Israel* v. *Israel*, 130 Fed. 237. In *Wisconsin* v. *Pelican Ins. Co.*, *supra*, at page 292, Mr. Justice GRAY said:

> "A judgment recovered in one State, as was said by Mr. Justice Wayne, delivering an earlier judgment of this court, 'does not carry with it, into another State, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State, it must

be made a judgment there; and can only be executed in the latter as its laws may permit.' McElmoyle v. Cohen, 13 Pet. 312, 325 (10: 177, 183)."

And one very important and logical result of this statement is that a State need not provide a court within which, and a procedure by which, the judgment of a sister State may be sued upon.

In *Anglo-American Provision Co.* v. *Davis Provision Co., supra,* this court, per HOLMES, J., said:

"* * * The parties are both Illinois corporations, and the plaintiff in error brought suit in the New York Supreme Court upon an Illinois judgment. By the New York Code of Civil Procedure, section 1780, it is provided that 'an action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only: * * * 3. Where the cause of action arose within the state, etc.' * * *.

"The State court decides that the cause of action did not arise within the state in the sense of the words of the Code, and, of course, we follow its construction, subject to the inquiry whether the statute as construed is consistent with the Constitution of the United States * * *.

"We are of opinion that the section of the Code as construed is not unconstitutional. The precise point has not been decided by this court, but it has been laid down in cases which raise greater difficulties than the present, that this provision of the constitution establishes a rule of evidence rather than of jurisdiction. Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 291, 32 L. Ed. 239, 243, 8 Sup. Ct. Rep. 1370; Andrews v. Andrews, 188 U. S. 14, 36, 47 L. Ed. 366, 371, 23 Sup. Ct. Rep. 237. The Constitution does not require the State of New York to give jurisdiction to the supreme court against its will. If the plaintiff can find a court into which it has a right to come, then the effect of the judgment is fixed by the Constitution and the act in pursuance of it which Congress has passed. Rev. Stat. section 905 (U. S. Comp. Stat. 1901, p. 677). But the Con-

stitution does not require the state to provide such a court * * *."

See also: *Weidman* v. *Weidman*, 174 N. E. 206 (Supreme Judicial Court of Mass., Jan. 8, 1931), especially at page 208.

The New Jersey statute in question (Sec. 94b of the New Jersey Corporation Act, plainly intends that the law courts of the State of New Jersey should not have jurisdiction over suits to enforce the statutory liability of stockholders of foreign corporations, and that the Court of Chancery of New Jersey should have sole jurisdiction to entertain such suits. The statute is thus in the same category as the section of the New York Code of Civil Procedure referred to in the Anglo-American Provision Co. case, *supra*.

It is respectfully submitted that, under the authority of the case of *Anglo-American Provision Co.* v. *Davis Provision Co., supra*, a State could constitutionally pass an act the effect of which would be that the State did not provide any means of enforcing a judgment of a sister State; and if it provided a certain remedy for enforcing such judgment, whether the same be a reasonable remedy or otherwise, it could not be compelled to afford a different procedure. So, conceding, for argumentative purposes only, the Superintendent's assessment to be a "judicial proceeding" within the meaning of the full faith and credit clause, still New Jersey might prohibit its enforcement by statute, and Section 94b, providing a certain form of remedy, instead of prohibiting any remedy, is constitutional.

The appellant relies upon the cases decided in this court involving proceedings to enforce assessments of stockholders of Minnesota corporations under liability provisions of Minnesota law, in which cases this court held that the refusal of courts of other states to allow recovery in said suits denied to the judicial proceedings

of the Minnesota courts (sequestration suits in which the necessity and amount of the assessments were determined and from which the plaintiffs derived their authority to bring suit) the full faith and credit to which said judicial proceedings were entitled under the constitutional clause and the Congressional Act of 1790, *supra*. These cases are: *Bernheimer* v. *Converse*, 206 U. S. 516; *Converse* v. *Aetna National Bank*, 212 U. S. 567; *Converse* v. *Hamilton*, 224 U. S. 243; *Selig* v. *Hamilton*, 234 U. S. 652; and *Marin* v. *Augedahl*, 247 U. S. 142.

In none of them was there involved a statute passed by the legislature of the forum in which the plaintiff chose to bring his suit to enforce the stockholder's liability to assessment, which deprived the courts of that State of jurisdiction to determine a suit of that nature. The only point made therein was that a court of one State, *having general jurisdiction*, could not on the ground of policy or in its discretion refuse to enforce the judgment or give effect to the judicial proceedings of a sister State. The distinction is made in the Anglo-American Provision Co. case, *supra*, by Mr. Justice HOLMES, who said, distinguishing the statute construed in another case from the one involved in the matter then before the court:

> "The statute made no discrimination in the right to come into court, according to the character of the plaintiff or of the cause of action, but attempted to create a defense against a plaintiff assumed to have a right to come into court and to invoke the jurisdiction. But when the plaintiff was in court, and exhibited his judgment, it was too late for the state to interfere. In the case at bar the plaintiff had no right to come into the New York Supreme Court."

F—The State of New Jersey is not required by the full faith and credit clause to enforce in its courts the cause of action created by the New York Constitution and banking laws in favor of the appellant, whether the liability of the shareholders thereunder be deemed contractual or otherwise.

These appellees do not contend that the liability sought to be enforced is penal, within the meaning of *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, and concede that similar liabilities have been declared by this court to have a contractual nature, although Mr. Justice HOLMES expresses doubt as to the nature of the contract in *Bernheimer* v. *Converse*, 206 U. S. 516, 535. But it cannot be disputed that liability is founded expressly upon the New York statute pleaded in the complaint below (R., p. 5, pars. 6 and 7, and p. 7, par. 10).

(1) *The decisions of this court involving the Minnesota laws were predicated upon the existence of judicial proceedings in that State.*

The appellant has seized upon the general similarity between the natures of the present action and of the actions in the line of cases involving the Minnesota laws, such as *Bernheimer* v. *Converse, supra,* and *Converse* v. *Hamilton, supra.* There is one very important point of difference, however, which is sufficient to show the inapplicability of the doctrine of *Converse* v. *Hamilton, supra,* to wit: In every case involving liability under the Minnesota laws, the plaintiff had sued upon a judicial decree or as the result of a judicial proceeding in the foreign State, Minnesota; whereas, in the case at bar, the appellant is suing upon a cause of action given to him solely by the Constitution and statutes of the State of New York. It may be true, as appellant argues, that the judicial proceedings in the Minnesota courts

were summary; but, nevertheless, the judicial orders or decrees made were those to which the courts of other States are required to give the same effect as they had by law or usage in the State of Minnesota (Act May 26, 1790, c. 11, 1 Stat. 122, R. S. Sec. 905, U. S. C. A. Title 28, Sec. 687). And it was that fact which was emphasized in the opinions of this court. *Vide: Selig* v. *Hamilton,* 234 U. S. 652, at 663. The argument appearing on page 69 of the appellant's brief, that the existence of judicial proceedings was not determinative of the Minnesota cases on the theory that the court orders involved therein would have been invalid in States other than Minnesota because of the absence of personal service in Minnesota of the stockholders affected, is without substance. That argument overlooks the well-known rule, frequently alluded to in the appellant's brief, that the courts of the domicile of a corporation have sufficient jurisdiction to determine the necessity for and amount of an assessment against stockholders, and that such judicial determinations insofar as they relate to such general affairs of the corporation are conclusive and binding upon its stockholders, even though the stockholders are beyond the reach of process, said stockholders being represented by the corporation and no personal judgment being found against them in such proceedings. *Bernheimer* v. *Converse,* 206 U. S. 516, 532; *Converse* v. *Hamilton,* 224 U. S. 243, 260; *Selig* v. *Hamilton,* 234 U. S. 652, 666; *Royal Arcanum* v. *Green,* 237 U. S. 531, 554; *Hartford Life Ins. Co.* v. *Ibs,* 237 U. S. 662, 671.

(2) *The public acts, i. e., statutes, of one State are not required by the full faith and credit clause to be given in every other State the same effect as they have in the State of their enactment.*

The full faith and credit clause is not self-executing. *McElmoyle* v. *Cohen,* 13 Peters, 312, especially page 325,

et seq.; Alabama State Bank v. *Dalton,* 9 How. 522; *Roller* v. *Murray,* 234 U. S. 738, 745. It required Congress to legislate as to the manner of proof and effect of the acts, records and proceedings which are entitled to full faith and credit thereunder. *Tilt* v. *Kelsey,* 207 U. S. 43. Accordingly, on May 26th, 1790, Congress passed the law which we have set out in full hereinabove. (Act, May 26, 1790, c. 11, 1 Stat. 122, R. S. Section 905, U. S. C. A. Title 28, Sec. 687.)

It is respectfully submitted that the distinction between the cases such as *Converse* v. *Hamilton, supra,* and the case at bar, is of vital importance and materiality for the reason that statutes and judicial records and proceedings of courts are afforded different treatment under the full faith and credit clause. The statute of 1790, *supra,* clearly shows this distinction, for the reason that said statute, with respect to *statutes,* merely provides a method of authentication thereof, whereas, with respect to *judicial records and proceedings,* it prescribes, in addition to a method of authentication, that said proceedings shall have the same effect in States where they are proved in evidence as they had in the State whose judicial proceedings and records they are.

In Justice STONE'S dissent in *Yarborough* v. *Yarborough,* 290 U. S. 202, at page 215, there is a note which reads as follows:

> "The constitutional provision giving Congress power to prescribe the effect to be given to acts, records and proceedings would have been quite unnecessary had it not been intended that Congress should have a latitude broader than that given the courts by the full faith and credit clause alone. It was remarked on the floor of the Constitutional Convention that without the extension of power in the legislature, the provision 'would amount to nothing more than what now takes place among all Independent Nations.' Hunt and Scott, Madison's

> Reports of the Debates in the Federal Convention of 1787, page 503. The play which has been afforded for the recognition of local public policy in cases where there is called in question only a statute of another state, as to the effect of which Congress has not legislated, compared with the more restricted scope for local policy where there is a judicial proceeding, as to which Congress has legislated, suggests the Congressional power."

The learned Justice appears to make the very point now contended for by these appellees. Therefore, whatever may be the compulsion upon the States to give effect to the judgments of sister States, there is no such compulsion to enforce a cause of action arising under the laws, or even by virtue of the laws, of a sister State.

The appellant relies upon the decisions of this court, in *Whitman* v. *National Bank of Oxford,* 176 U. S. 559, and *Hancock National Bank* v. *Farnum,* 176 U. S. 640, to demonstrate the unconstitutionality of Section 94b. It is, however, submitted that these two cases are distinguishable from the present one on the same ground as the decisions involving the Minnesota assessments are distinguishable; that is, judicial proceedings were involved in both of them. This court held in the above-cited cases that not to permit the enforcement of a suit brought by a creditor of a Kansas corporation who had in Kansas secured judgment against the corporation, would deny to the *Kansas judgment* that effect which it had in Kansas. It is clear that the Whitman and Farnum cases do not establish that all States must give effect to the *statutes* creating double liability by permitting recovery in their courts, the Kansas statutes being important only as showing what were the effects of such judgments in Kansas. This court in those cases carried out the Congressional enactment of 1790 (Act May 26, 1790, c. 11, 1 Stat. 122, R. S. Sec. 905, U. S. C. A., Title 28, Sec. 687) as to the effect to be given

to *judicial proceedings.* Thus, this court said in the Farnum case, *supra,* at page 643, f, after quoting R. S., Section 905:

> "Such is the congressional declaration of the effect to be given *to the records and judicial proceedings* of one state in the courts of every other state. In other words, the local effect must be recognized everywhere through the United States." (Italics ours.)

Nor have appellees contended, as mentioned on page 55 of the appellant's brief, that the judgment enforced in the Farnum case was one against the stockholder, but contended only that this court recognized the binding effect upon the stockholder of the judgment against the corporation on the theory of his privity with the corporation. *Hartford Life Ins. Co.* v. *Ibs,* 237 U. S. 662, 671.

Appellant also contends that *Royal Arcanum* v. *Green,* 237 U. S. 531, and *Modern Woodmen of America* v. *Mixer,* 267 U. S. 544, establish the unconstitutionality of Section 94b. It is submitted that the cases are not in point for several reasons:

1st: This court was in both those cases swayed by considerations of the peculiar nature of the corporations involved therein, *viz.*: fraternal benefit societies, and in the Mixer case commented upon the "complex and abiding relation" in which each and every member enters when joining such a society. In the Green case, the indivisible unity between the members and the fraternal benefit society was discussed thoroughly and at length, and this fact was emphasized in the opinion in the later case by Mr. Justice HOLMES. It may be noted that State courts had frequently, before the Green and Mixer cases were decided, determined, without regard to the full faith and credit clause, that, because of the nature of such societies, all questions as to the rights and duties

of the members thereof were to be determined by the law of the domicilliary State. A number of such cases are cited by this court in the Green case, on page 543. A compelling reason for the decision in the Green and Mixer cases is that the funds of the benefit society constitute a trust fund in which all the members wherever located participate. The trust fund is created by the assessments, and, because the participation in the fund must be governed by one law, it is proper that the assessments upon the members for the building up of the fund be governed by the same law. The same line of reasoning is not applicable to a business corporation, like the Bank of the United States, and there is no reason why this court should extend the rule of the Green case to business corporations whose stock is freely bought and sold as was that of the Bank of the United States.

2nd: The decisions in the fraternal benefit society cases held only that, as a question of conflicts of law, the courts in which suits involving questions as to the rights and liabilities of the members of such societies are being adjudicated should apply the substantive law of the corporate domicile in determining those rights and liabilities. The decisions do not imply that remedies for the enforcement of such rights provided under the domicilliary laws must be applied in other jurisdictions. In other words, the contract is to be construed as it is construed in the State of the domicile, and other States are not permitted to change the terms of the contract.

3rd: In the Green case, a judgment in the domicilliary state of Massachusetts, in a suit to which the corporation had been a party, and, hence, the individual members had been parties by representation (*Selig* v. *Hamilton*, 234 U. S. 652), preceded the institution of the suit in New York, and, of course, the member could

not be heard to controvert the adjudication in that case which was pleaded in the answer to his action. It is interesting to observe that this court, in the subsequent case of *Hartford Life Ins. Co.* v. *Barber,* 245 U. S. 146, preferred to base its decision upon the binding effect of the prior judgment in the State of domicile, rather than upon the necessity of construing the insurance contract involved by the domicilliary law.

4th: In both the Mixer case and the Green case, the fraternal society was the defendant and not the plaintiff. In the earlier case, Green sued for a declaration that he was entitled to pay his assessments to the society at a former and lower rate. The defendant society pleaded that under the law of Massachusetts as interpreted by the judgment in Massachusetts, the increase of the assessment rate was valid. The action of the New York court in holding to the contrary was deemed unconstitutional. In the Mixer case suit was again instituted against the society, this time for a benefit, and the defendant pleaded a certain by-law whose validity had been upheld by the courts of the domicilliary State. This court held that the *defenses* were required to be sustained by the full faith and credit clause. In the case at bar, the appellant maintains that the New Jersey courts must permit him to enforce his assessment, but the reasoning of the Green and Mixer cases is not applicable to support the claim now made. For there is a distinction between a plaintiff asserting a foreign "public act" as the basis of his rights, and a defendant asserting the same as matter of defense. This point was explained in the case of *Bradford Elec. Light Co.* v. *Clapper,* 286 U. S. 145, wherein an action in tort was brought in New Hampshire by the widow of a deceased employee to recover damages for the death from his employer. The contract of employment was made in Vermont,

but the injury occurred in New Hampshire. Under the law of New Hampshire, a workman was not confined to his remedy under the Workman's Compensation Law, but might elect to bring a common law action. Under the law of Vermont, a workman was confined to his claim for compensation. The New Hampshire court refused to permit a plea, by the defendant employer, of the terms of the Vermont law and permitted a judgment to go for the plaintiff. The judgment was reversed in this court on the ground that the full faith and credit clause required the New Hampshire court to permit such plea. Mr. Justice BRANDEIS said; on page 160:

> "It is true that the full faith and credit clause does not require the enforcement of every right conferred by a statute of another State. There is room for some play of conflicting policies. Thus, a plaintiff suing in New Hampshire on a statutory cause of action arising in Vermont might be denied relief because the forum fails to provide a court with jurisdiction of the controversy (citing cases); or because it fails to provide procedure appropriate to its determination (citing cases); or because the enforcement of the right conferred would be obnoxious to the public policy of the forum (citing cases); or because the liability imposed is deemed a penal one (citing cases). But the Company is in a position different from that of a plaintiff who seeks to enforce a cause of action conferred by the laws of another State. The right which it claims should be given effect is set up by way of a defense to an asserted liability; and to a defense different considerations apply (citing cases). *A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to*

irremediable liability. This may not be done. Compare Modern Woodmen v. *Mixer,* 267 U. S. 544, 550, 551, 69 L. ed. 783-785, 41 A. L. R. 1384, 45 S. Ct. 389; Aetna L. Ins. Co. v. Dunken, 266 U. S. 389, 69 L. ed. 342, 45 S. Ct. 129; Supreme Council, R. A. v. Green, 237 U. S. 531, 59 L. ed. 1089, L. R. A. 1916A, 771, 35 S. Ct. 724. See also Western U. Teleg. Co. v. Brown, 234 U. S. 542, 58 L. ed. 1457, 34 S. Ct. 955, 5 N. C. C. A. 1004; Atchison T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 69, 53 L. ed. 695, 701, 29 S. Ct. 397." (Italics ours.)

A further argument against the appellant's contention that the full faith and credit clause requires each State to give to statutes of a sister State the same effect that they are given in the sister State is found in the repeated decisions of this court that the construction or interpretation by the courts of one State of the Constitution or a statute of another State raises no Federal question under the full faith and credit clause. *Glenn* v. *Garth,* 147 U. S. 360; *Lloyd* v. *Matthews,* 155 U. S. 222; *Allen* v. *Allegheny Co.,* 196 U. S. 458; *Western Life Indemnity Co.* v. *Rupp,* 235 U. S. 261; *Louisville & Nashville R. R. Co.* v. *Melton,* 218 U. S. 36, 51.

POINT II.

Causes of action created by the laws of a State are enforced in a sister State only by comity.

Contracts made in one State are enforceable in a sister State, not by any compulsion of the United States Constitution, but upon principles of comity. *Bank of Augusta* v. *Earle,* 13 Peters, 519.

Statutes have no operation or effect *per se* except within the territorial limits of the State. *Pennoyer* v. *Neff,* 95 U. S. 714; *Dexter* v. *Edmands,* 89 Fed. 467; *Tennessee Coal Iron & R. R. Co.* v. *George,* 233 U. S.

354; *Hancock National Bank* v. *Ellis*, 172 Mass. 39, 51 N. E. 207.

Transitory causes of action created by the statutes of one State *may*, however, be enforced in another State. *Tennessee Coal Iron & R. R. Co.* v. *George, supra; Dennick* v. *Central R. R. of New Jersey*, 103 U. S. 11; *Loucks* v. *Standard Oil Company of New York*, 224 N. Y. 99, 120 N. E. 198; *Howarth* v. *Angle*, 162 N. Y. 179, 56 N. E. 489. Such enforcement, however, is by the comity of the sister State and not by virtue of the full faith and credit clause of the United States Constitution. See *Loucks* v. *Standard Oil Company of New York, supra*, wherein CARDOZO, C. J., wrote an instructive opinion on this point. See also, *Stewart* v. *Baltimore & Ohio R. R. Co.*, 168 U. S. 445; *Brown* v. *Perry* (Vermont Supreme Court Nov. 5, 1931), 156 Atl. 910; *Texas etc. R. Co.* v. *Cox*, 145 U. S. 593; *Dexter* v. *Edmands, supra; Hancock National Bank* v. *Ellis, supra; State ex rel. Bossung* v. *District Court* (Minnesota Supreme Court, August 2nd, 1918), 168 N. W. 589, 1 A. L. R. 145.

A—Comity will be withheld where such enforcement would violate the public policy of such State.

Under the general rule of comity, New Jersey is not required to enforce contracts made in another State where the enforcement thereof would violate the plain public policy of New Jersey, even if the contracts be valid by the *lex loci contractus*. *Flagg* v. *Baldwin*, 38 N. J. Eq. 219 (Court of Errors and Appeals). The same rule obtains where the cause of action is based directly upon a statute of a sister State.

Under the rule of comity, a State may, and frequently does, enforce actions arising out of the statutes of a

sister State when their enforcement is not inconsistent with its public policy. This is the entire force and extent of the decisions of the various cases cited on pages 39 to 42 of appellant's brief and the other cases cited in said brief wherein the courts *permitted* the enforcement of an assessment against a stockholder of a State banking corporation which was not founded upon an actual judicial proceeding. In the Pennsylvania case of *Broderick* v. *Stephano,* 314 Pa. 408, 171 Atl. 582, it is true that the court mentioned the full faith and credit clause, but this, it is submitted, was unnecessary to the decision, since there was neither a public policy nor a statute of Pennsylvania which would prevent such recovery at law, and the Pennsylvania Banking Act contains provisions similar to those in the New York Act. (See 171 Atl. Rep. at p. 583.) The statement on page 39 of appellant's brief that the same result would have been reached in those cases if the full faith and credit clause compelled the result is no argument that such compulsion exists.

As pointed out in the beginning of this brief, the public policy of the State of New Jersey, by reason of the absence of any provision in that State for double liability of stockholders in banking corporations, and by reason of Section 94b, is against the enforcement of such liability, except in an accounting action in the Court of Chancery of that State. It is submitted, therefore, that, under the doctrine of comity, New Jersey need not enforce the double liability of stockholders of moneyed corporations of other States. *Stewart* v. *Baltimore & Ohio R. R. Co., supra.*

That it does offend the public policy of the State of New Jersey (as evidenced by its refusal to create a similar liability on stockholders in domestic moneyed corporations and by the enactment of the statute involved herein), to enforce liabilities such as the court

is now asked to enforce except by the equitable suit provided for in the statute, requires no argument. See opinion of Justice PARKER, below (R., p. 21). This court said in *Bond* v. *Hume*, 243 U. S. 15 at page 22:

> "And finally, it is certain that, *as it is peculiarly within the province of the law-making power to define the public policy of the state*, where that power has been exerted in such a way as to manifest that a violation of public policy would result from the enforcement of a foreign contract validly entered into under a foreign law, comity will yield to the manifestation of the legislative will and enforcement will not be permitted." (Italics ours.)

B—Under the doctrine of comity, a State may constitutionally refuse to enforce a transitory cause of action created by the laws of a sister State.

Had the policy of the State of New Jersey been to prohibit enforcement of such liability in any court and had there been eliminated from Section 94b that portion permitting an equity action, the statute would still be constitutional, for, according to the decisions of this court, a State may constitutionally prohibit any suit in its courts to enforce a cause of action arising under the statutes of a sister State, provided it does not thereby discriminate against citizens of other States. *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142, is a leading case on this point. In that case, suit was brought in Ohio on a death action arising under a Pennsylvania statute, the deceased having been a citizen of Pennsylvania. Judgment for the plaintiff in the trial court was reversed by the Ohio Supreme Court because an Ohio statute provided that recovery could be had under a statute of a foreign State creating a cause of action for wrongful death only when the deceased was

a citizen of Ohio. The Supreme Court of the United States affirmed the action of the Ohio Supreme Court. After stating the rule of the privileges and immunities clause, this court said on page 148:

> "But, subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. * * * But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states."

It was held that the Ohio statute was constitutional, for it did not discriminate between plaintiffs or beneficiaries, but as to the subject matter of the suit. The court said that the plaintiff has "been denied access to the Ohio courts * * * because the cause of action which she presents is not cognizable in those courts."

[The intimation in the appellant's grounds of appeal (No. 2, R., p. 33) that Section 94b violates the privileges and immunities clause (U. S. Constitution, Article IV, Section 2), which point is not argued in appellant's brief, is rebutted by this last-cited case, for it is obvious from the language of the statute in question that the same result obtains thereunder regardless of the citizenship of the person instituting the action or of the citizenship of the creditors of the corporation in question.]

In *Dougherty* v. *McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619, a case construing a statute similar to that construed in *Chambers* v. *Baltimore & Ohio R. R. Co.*, *supra*, the Illinois Supreme Court said:

"Whatever force and obligation the laws of one country have in another depend solely on the laws and municipal regulations of the latter. Story on Conflict Laws (8th Ed.), Section 23. * * * Except, however, 'as restrained and limited by that instrument (Constitution), they, (the States) possess and exercise the authority of independent states.' Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565. It was not intended by the provisions of the federal constitution relied on by counsel to give to the laws of one state any operation in other states except by a permission, express or implied, by those states. Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357. Laws are without force beyond the jurisdiction of the State which enacts them, and can have no extraterritorial effect except by a comity of other States. Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123. * * * If the policy of the forum has been expressed positively in a statute, that policy must prevail. When the Legislature speaks upon a subject upon which it has contitutional power to legislate, public policy is what the statute indicates. * * * Each state, subject to restrictions of the Federal Constitution, determines the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and how far its courts having jurisdiction of the parties shall hear and decide transitory actions where the cause of action has arisen outside of the state. St. Louis, Iron Mountain & S. Railroad Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. ed. 1061. Different states may have different policies, and the same state may have different policies at different times, provided that any policy the state may choose to adopt must operate the same way on its own citizens and those of other states. Chambers v. Baltimore & Ohio Railroad Co., 207 U. S. 142, 28 Sup. Ct. 34, 52 L. ed. 143."

See also, *Spokane & I. E. R. Co.* v. *Whitley*, 237 U. S. 487; *Bradford Electric Light Co.* v. *Clapper*, 286 U. S.

145, especially at page 160; *Home Ins. Co.* v. *Dick,* 281 U. S. 397, especially at page 409, f; and the note in 74 A. L. R. 710, *et seq.*

C—The refusal of New Jersey to extend its comity so as to enforce appellant's alleged cause of action in its Supreme Court does not raise a Federal question, and, therefore, is not reviewable by this court.

Since the cause of action created by the Constitution and Banking Law of New York State can be enforced in other jurisdictions only through the comity of the latter States, it is no concern of this court whether the comity was wisely or unwisely withheld in the present instance. *Finney* v. *Guy,* 189 U. S. 335; *Bond* v. *Hume,* 243 U. S. 15; *Allen* v. *Allegheny Co.,* 196 U. S. 458. The statement made on page 56 of appellant's brief that *Finney* v. *Guy, supra,* was decided solely on the ground that the receiver had no title or right to enforce the assessment in Minnesota under Minnesota law, and hence had no greater rights in other States, is not correct; but the decision was based on another ground, namely, that whether the Wisconsin "court should have permitted this action to be maintained because of the principle of comity between the States, is a question exclusively for the courts of that State to decide."

Hence, it is submitted that the court below was entirely correct in deciding that such causes of action as the appellant presented are enforceable in sister States only through comity (*Finney* v. *Guy,* 189 U. S. 335), and that there is no constitutional inhibition upon the State of New Jersey which would invalidate Section 94b of the New Jersey Corporation Act.

POINT III.

Section 94B of the New Jersey Corporation Act does not violate the due process clause of the Fourteenth Amendment of the United States Constitution.

The appellant argues that the remedy outlined in Section 94b of the New Jersey Corporation Act is so cumbersome and unreasonable as to deprive the appellant of "his property rights" in the assessment alleged to be owing by stockholders resident in New Jersey, without due process of law. This argument is not sound. Certainly, there was no vested right in the special remedial procedure outlined in Section 80 of the New York Banking Law. *Schriver* v. *Woodbine Savings Bank,* 285 U. S. 467, 479; *Howarth* v. *Angle,* 162 N. Y. 179, 188. These cases recognize that where a statute creates a liability of stockholders to assessment, although the liability is transitory, the special statutory forms of remedy provided by such statute may not be resorted to elsewhere. Section 80 of the Banking Law of New York (R., p. 5) is such a special form of remedy upon the obligation created by Section 120 of that Act (R., p. 7) and by the New York Constitution, Article VIII, Section 7 (R., p. 5), inasmuch as Section 80 provides for the method of ascertaining the necessity and amount of said liability, for the accrual of the cause of action in the Superintendent, for the form of action to be either joint or several, for the evidential value of the Superintendent's Certificate, and for the limitation upon the action (R., p. 5). The State of New York, by virtue of the procedural provisions contained in its statutes, cannot interfere with New Jersey's control over its courts. *Tennessee Coal &c. Co.* v. *George,* 233 U. S. 354; *Hancock National Bank* v. *Ellis,* 172 Mass. 39, 51 N. E. 207; *Spokane I. E. R. Co.* v. *Whitley,* 237 U. S. 487 at pages 494, 495. The appellant is met

by this rule if he bases his supposed right to sue at law in New Jersey upon the New York Banking Law, Section 80. The principle declared in the cases of *Schriver* v. *Woodbine Savings Bank, supra,* and *Howarth* v. *Angle, supra,* is persuasive of the contention of these appellees that, in seeking to enforce the stockholders' liability outside of New York, the appellant must *accept* whatever remedies are provided by the forum.

The Legislature has plenary power to provide in what courts and through what procedure a right of action may be enforced in the State of New Jersey. The right to legislate upon the courts within its borders and the remedies afforded therein, inheres in the State of New Jersey as a sovereign, and there is nothing in the United States Constitution which interferes with this complete control. *M'Elmoyle* v. *Cohen,* 13 Peters 312; *Bacon* v. *Howard,* 61 U. S. 22; *Chambers* v. *Baltimore & Ohio RR. Co.,* 207 U. S. 142; *Alabama State Bank* v. *Dalton,* 9 How. 522; *Thorington* v. *Montgomery,* 147 U. S. 490; *Delaware City &c. Co.* v. *Reybold,* 142 U. S. 636. Under this unquestionable power, the New Jersey Legislature provided in Section 94b of the Corporation Act for the equitable accounting proceeding, and the statute is conclusive upon this court. *Bond* v. *Hume,* 243 U. S. 15; *Loeber* v. *Schroeder,* 149 U. S. 580. In the latter case, the court stated at page 585:

> "The said statute relates to a matter of state practice alone, and the proper construction of that statute, upon well settled principles, rested with the state courts. The question as to whether the plaintiff's remedy was in law or in equity was a matter dependent entirely upon local law, and involved no Federal right whatever."

In *Louisville & Nashville R. R. Co.* v. *Schmidt,* 177 U. S. 230, this court held:

> "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts, or regulate practice therein."

As shown under Points I and II, *supra*, New Jersey may entirely refuse to enforce in its courts the stockholders' liability. Instead of closing our courts completely to suits under statutes to enforce such liability, the State of New Jersey has seen fit to give a remedy of a certain kind. The appellant must be content therewith and cannot complain of any alleged unreasonableness of that remedy provided. It may be remarked that the procedure required by Section 94b is no different from that required in New York prior to the enactment of the present Section 80 of the New York Banking Law (see *Marshall* v. *Sherman*, 148 N. Y. 9, 42 N. E. 419, and *Cheney* v. *Scharmann*, 145 N. Y. App. Div. 456, 129 N. Y. Supp. 993), and it was also considered the reasonable procedure by the New York Supreme Court in *Broderick* v. *Adamson, et al.*, 148 N. Y. Misc. 353, 265 N. Y. Supp. 804 at 819. It is suggested by the decision in the Connecticut case of *Broderick* v. *McGuire, et al.*, 119 Conn. 83, 174 Atl. 314, that in Connecticut, too, an accounting action similar to the New Jersey one would be proper. The New Jersey cases cited by the appellant under Point II of his brief; namely, *McDermott, Receiver* v. *Woodhouse*, 87 N. J. Eq. 615; *Chicago, Title & Trust Co.* v. *Young*, 90 N. J. Eq. 27, and *Graham* v. *Fleissner*, 107 N. J. L. 278, do not suggest the propriety of an action at law, for those cases dealt with the common law liability of subscribers for corporate stock to pay the amount of their subscription and not with the statutory liability of stockholders to assessment to pay corporate debts.

We may, however, discuss the alleged unreasonableness of the remedy provided by the State of New Jersey. In

reply, it is submitted that the difficulties that the appellant envisions are due not to the frailty of the New Jersey statute but rather to the size of the corporation which the appellant has taken over and to its many business ramifications. If the ~~depositors~~ stockholders of the bank numbered but two hundred, and the creditors five hundred, we assume no fault would be found on this score with the statutory provisions. The fortuitous circumstance that in this particular case a giant octopus has expired is no ground for attack upon the statute, nor is any basis afforded in the due process clause for such attack because the appellant, by reason of the factual situation in the case, is obliged to spend much time, effort and money to conduct and conclude successfully the proposed litigation.

POINT IV.

The judgment below was properly entered, and the propriety of such entry is not reviewable by this court.

The motion in this case to strike out the appellant's complaint was for matter of substance and not matter of form. By Rule 40 of the New Jersey Supreme Court (Rule 26 of Practice Act of 1912, P. L. 1912, Chap. 231, p. 389), which reads as follows:

> "Demurrers are abolished. Any pleading may be struck out on motion on the ground that it discloses no cause of action, defense or counterclaim respectively. The order made upon such motion is appealable after final judgment. In lieu of a motion to strike out, the same objection, and any point of law (other than a question of pleading or practice) may be raised in the answering pleadings, and may be disposed of at, or after, the trial; but the court, on motion of either party, may determine the question so raised before trial, and if the decision be decisive

> of the whole case the court may give judgment for the successful party or make such order as may be just,"

the motion to strike the complaint in this case was the equivalent of a general demurrer at common law. Where a demurrer is sustained, and leave is not given to plead over, judgment final for the demurrant should be entered. *Chitty on Pleading,* Vol. 1, 13th American Ed., page 668. That is precisely what took place in this case. Appellant's brief, page 83, erroneously states that the order entering judgment final in favor of the defendant (R., p. 22), was entered "over objections of counsel for plaintiff." This is not so. The order complained of recites that no application was made to amend the said complaint; that is, no leave was asked to plead over (R., p. 22); hence, it is submitted, the entry of final judgment for the demurring defendants was necessary and proper (*United States* v. *The Three Friends,* 166 U. S. 1). Moreover, it was necessary that final judgment be entered to enable the plaintiff to appeal the case for the determination of the questions raised by him under the full faith and credit clause of the United States Constitution. See *United States* v. *The Three Friends, supra.*

Furthermore, it is submitted that under the rule of *Thorington* v. *Montgomery,* 147 U. S. 490, the form of the judgment rendered was purely a matter of practice under the procedure of the State of New Jersey, did not draw in question any right that the appellant had under the Constitution and laws of the United States and raises no Federal question.

POINT V.

The appellant, as Superintendent of Banks of the State of New York, is without right or authority to maintain the alleged cause of action in the State of New Jersey.

It affirmatively appears by the allegations of the complaint in this cause (R., p. 3, *et seq.*), that the appellant, plaintiff below, as Superintendent of Banks of the State of New York, is a mere statutory receiver and that his suit in the New Jersey courts to collect assessments against stockholders, residents of New Jersey, is founded upon the laws of the State of New York, plus his own administrative act in determining that a deficiency of assets exists out of which to satisfy creditors of the Bank of United States, and in making an assessment upon stockholders accordingly.

The courts of the State of New York, interpreting the New York statutes, classify the Superintendent of Banks as a statutory receiver. *Isaac* v. *Marcus,* 258 N. Y. 257, 179 N. E. 487; *Matter of Union Bank,* 204 N. Y. 313, 97 N. E. 737. They also hold that the Superintendent of Banks does not possess the legal title to such assets as are involved in the present suit, but only the right by statute to sue and collect. *LaFayette Trust Co.* v. *Higginbotham,* 136 N. Y. App. Div. 747, 121 N. Y. Supp. 490. It follows from the fact that the appellant, as Superintendent of Banks of the State of New York, was only a statutory receiver, having no legal title to the assets sought to be collected in New Jersey, that he is without standing to come over into the State of New Jersey and prosecute a suit in the latter State. This precise point has been adjudicated by the Supreme Court of the State of Tennessee in *Van Tuyl* v. *Carpenter, et als.;* 135 Tenn. 629, 188 S. W. 234. In that case, Van Tuyl, Superintendent of Banks of the State of New York,

operating under the very laws recited in the appellant's complaint below, sued in Tennessee to enforce his assessments against stockholders. It was held that the Superintendent of Banks of the State of New York had no standing to bring such suits in the courts of Tennessee, and the court wrote a lengthy opinion thereon, in which is included the following language:

> "The right of action, if any, is not in the bank but in the Superintendent of Banks. His right is rooted in the statute but that statute gives him no right to sue in a foreign state. Such vestiture has been held, by the highest authority, an essential prerequisite. Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 388" (other decisions of the United States Supreme Court were also cited). * * *
>
> "However, if the Receiver has the legal title to the claim sued on, he has generally a right to sue in the foreign State (Hardee v. Wilson, 129 Tenn. 511, 167 S. W. 475), but the New York cases hold that the Superintendent of Banks does not possess the legal title to such assets as are here sued on, but only the right to sue and collect. LaFayette Trust Co. v. Higginbotham, 136 App. Div. 747, 121 N. Y. Supp. 490; Matter of Union Bank of Brooklyn, 204 N. Y. 313, 97 N. E. 737. * * *
>
> "We may add that even if it appeared that the foreign Superintendent of Banks, or statutory receiver, had either the title to the assets, or power given him by the statute of his State, to sue in a foreign jurisdiction, or both, we do not see how he could, in a foreign jurisdiction, sue stockholders on their double liability, without a previous judicial ascertainment, in his own State, in a suit brought against the corporation, showing debts and assets and the necessity of a call on stockholders. The possession of title would be of no importance unless the amount due could be ascertained. Likewise, the right to sue in a foreign State could have no extra-territorial effect, save as an incident to a judicial proceeding in the receiver's own State, purporting to confer that right under statutory authority; it

would then be operative, if at all, under the full faith and credit clause of the Federal Constitution."

See also, *Hqle* v. *Allinson*, 188 U. S. 56.

Clark v. *Willard*, 292 U. S. 112, and *Relfe* v. *Rundle* (*Life Association of America* v. *Rundle*), 103 U. S. 222, are distinguishable from the present case, in that, in both of those cases it was found that the liquidator was endowed by the laws and proceedings of the state of the corporate domicile with title to the corporate property, including the proceeds of the assessments against the stockholders, whereas, as above stated, appellant has no title thereto under the New York laws.

Wherefore, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 528.

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York,
Appellant,

vs.

MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, *et al.*,
Respondents.

Appeal from the Court of Errors and Appeals of the State of New Jersey.

BRIEF FOR RESPONDENTS MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, *et al.*

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 528

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York,
Appellant,

vs.

MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, *et al.*,
Respondents.

Appeal from the Court of Errors and Appeals of the State of New Jersey.

(References hereinafter to the transcript of record are indicated by the word "Record". References to appellant's brief are indicated by the word "Brief". All italics are ours.)

BRIEF FOR RESPONDENTS MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, *et al.*

Introductory Statement.

This suit, brought in the courts of New Jersey, is based upon a cause of action created by a statute of the State of New York, viz.: the New York Banking Law. The cause of action is one which is expressly given to the plaintiff by Section 80 of that statute (Brief, pp. 95 and 96). That section provides in substance that:

(a) Where the Superintendent has taken possession of the property and business of a bank (as authorized by Section 57 of the same statute), and

(b) he "has determined from his examination of its affairs that the reasonable value of the assets of such corporation is not sufficient to pay its creditors in full," and

(c) he has determined to enforce the individual liability of stockholders (imposed on them by Section 120 of that Statute) which makes them "individually responsible, equally and ratably and not one for another, for all contracts, debts and engagements of the bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares," and

(d) he has made written demand upon the stockholders for payment of the latters' equal and pro rata shares of the total amount which he has determined to assess against said stockholders, and

(e) such a stockholder "shall fail or neglect to pay such assessment within the time fixed in said notice," he, the Superintendent of Banks, "shall have a cause of action, in his own name as superintendent of banks, against such stockholder either severally or jointly with other stockholders of such corporation, for the amount of such unpaid assessment or assessments, together with interest thereon from the date when such assessment was, by the terms of said notice, due and payable."

The cause of action thus given springs directly from the New York statute and accrues to the Superintendent of Banks thereunder upon the occurrence of the conditions specified therein. Plaintiff's complaint alleges the occurrence of these conditions and the consequent accrual of that statutory cause of action against defendants.

The court below struck out the complaint on defendants' motion on the ground "that the laws of this state prohibit

the maintenance of this action in this court and that the complaint does not set forth any cause of action which is cognizable in a court of law of this state" (Record, p. 21). Defendants' motion and the court's said action thereon were based upon a certain provision of an Act of the Legislature of the State of New Jersey entitled, "A supplement to an act entitled 'An Act concerning corporations' (Revision, 1896), approved April twenty-first, one thousand eight hundred and ninety-six," being Chapter 50, p. 124, P. L. 1897, and now commonly known and referred to as Section 94b of the Corporation Act of New Jersey, which provides as follows:

> 2. No action or proceeding shall be maintained in any court of law in this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country, and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in the nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties.
>
> "3. This act shall take effect immediately.
> "Approved March 30, 1897."

In the course of the opinion filed by it on January 30, 1934, the court below said:

> "The proposition advanced by the defendants is that this statute, which it is admitted was in existence in New Jersey before the organization of the Bank of the United States, bars any such action as the present one, * * *" (Record, p. 15).

Then, after dealing with various counter-arguments put forward by plaintiff, the court came to consider the one

> "that to deny the right of this Commissioner to sue at law in this State, as he is suing, is in defiance of the full faith and credit clause of the constitution (fol. 31). Here again I think the point is without substance. It is true that it has been held in one or more cases in the Supreme Court of the United States, as for example in Converse *v.* Hamilton, 224, U. S., 243, that where an assessment of this kind has been definitely adjudicated by the courts of the home State and turned in effect into a judgment against the various parties concerned, that adjudication is enforcible in a sister State by virtue of the federal constitution although the laws of the latter state may be to the contrary. But here we have no court adjudication of any kind. The Commissioner, pursuant to a statute, has taken charge and has determined as a Commissioner that the United States Bank is insolvent and that the stockholders ought to be assessed to make up the deficit. That no doubt he can enforce in New York State under the statute of that State. But when he comes over here he is met by the express prohibition of our statute against any suit at law and by the requirement that the suit shall be in the nature of an equitable accounting, to which all stockholders shall be parties. In the proceeding

before me the suits are several, and only one defendant is a party in each, in theory of law" (Record, p. 20).

Concluding its opinion the court below says:

> "My conclusion is that the present complaint cannot be supported and must be struck out as stating causes of action which by statute are not maintainable at law in this State. Whether a judgment for the defendant should be directed thereon is a matter on which counsel are probably entitled to be heard.
>
> As I view the matter now, it would seem that there should be a judgment for the moving defendants subject of course to appeal, and without prejudice to the filing of a bill in equity on the lines laid down in Section 94-b of the Corporation Act. The matter might be transferred to the Court of Chancery, but the complaint would have to be reframed, I think in any event.
>
> I will hear counsel on the first convenient motion day as to settlement of these details" (Record, p. 21).

No application being made thereafter by plaintiff to the court as suggested in the court's foregoing opinion, the court, on due notice to plaintiff, made an order as aforementioned, on February 10, 1934, striking out plaintiff's complaint and directing the entry of a final judgment (Record, pp. 21, 22). The judgment entered in pursuance of said order was thereafter affirmed on appeal by the New Jersey Court of Errors and Appeals (Record, pp. 30, 31).

Appellant contends that Section 94b of the Corporation Act of New Jersey and the aforesaid judgment operate in this case:

(1) To deny full faith and credit to the New York Banking Law; (2) to deprive appellant and the creditors of the Bank of property without due process of law; and (3) to deny to appellant and the creditors of the Bank the "privileges and immunities of citizens in the several states," all in violation of the pertinent provisions of the Constitution of the United States.

Appellant's chief and almost sole reliance is upon his first contention. His second and third contentions are barely asserted near the end of appellant's brief (pp. 72, 80, 81 and 82). We shall deal with these contentions in the order named.

POINT I.

Appellant's contention that Section 94b of the Corporation Act of New Jersey and the judgment below operate to deny "full faith and credit" to the New York Banking Law in violation of the Constitution of the United States is erroneous.

Appellant's first contention is in substance that the New Jersey statute and the aforesaid judgment operate in this case to deny full faith and credit to the New York Banking Law.

Before discussing the appellant's arguments in this regard and the cases cited in support thereof, we shall undertake affirmatively to establish the proposition that the full faith and credit clause of the Constitution of the United States does not compel a State to open and lend its courts to the prosecution of a suit based upon a cause of action created by the statutes of another State.

One of the earliest cases to evoke a pronouncement of this court upon the subject of the maintainability of a suit

in the courts of one State upon a cause of action arising under the laws of another State, was the case of *The Texas & Pacific R. R. Co.* v. *Cox*, 145 U. S. 593, 36 Law Ed., 829. That was an action to recover damages for the death of plaintiff's husband alleged to have been caused by defendant's negligence. Plaintiff was a resident of Texas. Defendant's railroad ran through that State and the suit was brought in that State in a Federal court. The Federal court had jurisdiction because the defendant was incorporated under acts of Congress. (36 L. ed., at p. 832.) The decedent's injury and death occurred in the State of Louisiana and plaintiff claimed the right "to recover under the law of that State, which was set forth, as well as under that of the State of Texas, it being averred that they were substantially the same" (36 L. ed., p. 830). Defendant demurred, *inter alia*, on the ground that "the cause of action founded upon the statute of Louisiana conferring the right to recover damage for an injury resulting in death, was not enforceable in Texas" (36 L. ed., at p. 833). In considering this ground, this Court discusses what causes of action arising in one State are enforceable in another State, and says:

> "a right arising under or a liability imposed by either the common law or the statute of a State may, where the action is transitory, be asserted and enforced in any court having jurisdiction of such matters and of the parties" (36 L. ed., at p. 833),

but as a complement to this rule, this court immediately adds that

> "the rule thus stated is generally recognized and applied *where the statute of the State in which the cause of action arose is not in substance inconsistent*

> *with the statutes or public policy of the State in which the right of action is sought to be enforced"* (36 L. ed., at p. 833),

Finding that in the case before it

> "The statutes of these two states on this subject *are not essentially dissimilar, and it cannot be successfully asserted that the maintenance of jurisdiction is opposed to a settled public policy of the State of Texas"* (at p. 833),

this court holds that the action was maintainable in Texas.

In other words, according to the aforesaid rule, a cause of action arising under a statute of one State *may not* be "asserted and enforced" in another State if the statute of the State in which the cause of action arose *is* "in substance *inconsistent with the statutes or public policy* of the State in which the right of action is sought to be enforced."

To be sure, there was no contention in that case that the full faith and credit clause of the United States Constitution required the courts in Texas to enforce the cause of action given by the laws of the State of Louisiana; but the qualification embodied in the rule there enunciated by this Court is so utterly inconsistent with the existence of such a constitutional requirement that it is tantamount to a *denial* of its existence. Surely it is inconceivable that this court, one hundred years after the adoption of the United States Constitution, would categorically assert the non-enforceability in one State of a cause of action created by the statutes of another State which was in conflict with the former's laws or public policy, merely because the "full faith and credit" clause was not invoked in the particular case at bar. Surely, too, this court would not have been

at pains to sustain the cause of action in that case *on general principles of law* if by the mere force and mandate of the Constitution of the United States the maintainability of the suit could have been decided summarily.

The broadest possible expression of the rule above-mentioned was given by this court in the case of *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 52 L. ed. 143. That was a suit brought in the courts of Ohio by a citizen of the State of Pennsylvania to recover damages for the death of her husband from injuries alleged to have been caused by the defendant's negligence. Both the injuries and the death occurred in Pennsylvania and the suit was based upon the provisions of the constitution and statutes of that State which gave a cause of action in such a case. The highest court of Ohio had held that the action was not maintainable in the courts of Ohio because "the common law of the State forbade such action" (at p. 146). There was, however, a statute in Ohio which expressly permitted such an action in case the decedent was a citizen of Ohio. The plaintiff appealed to the United States Supreme Court on the ground that the judgment violated "article 4, section 2, paragraph 1, of the Constitution of the United States, which provides that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States'" (52 L. ed., at p. 146). This court enters upon a consideration of this contention with this statement: "In the decision of the merits of the case there are some fundamental principles which are of controlling effect" (52 L. ed., at p. 146). The first of such "principles" which the court adduces is that "The right to sue and defend in the courts * * * must be allowed by each State to the citizens of all other States *to the precise extent that*

it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution." Immediately after this statement the court says:

> "But, subject to the restrictions of the Federal Constitution, *the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions*" (at p. 146).

What "restrictions" of the Federal Constitution the court was alluding to as being a qualification upon this right of each state to determine "whether and to what extent the State will entertain in its courts transitory actions where the causes of action have arisen in other jurisdictions," is unequivocally indicated by the court in the following words:

> "But any policy the state may choose to adopt *must operate in the same way on its own citizens and those of other states.* The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts *are given to its own citizens and withheld from the citizens of other states* is void, because in conflict with the supreme law of the land" (at p. 146).

In concluding its opinion, the court uses language which cannot fail to exercise a decisive influence upon a judgment of the question under discussion in the case at bar.

"It appears clearly, therefore, that the cause of action which the plaintiff sought to enforce was one created for her benefit and vested originally in her. She has not been denied access to the Ohio courts because she is not a citizen of that state, *but because the cause of action which she presents is not cognizable in those courts.* She would have been denied hearing of the same cause for the same reason if she had been a citizen of Ohio. In excluding her cause of action from the courts the law of Ohio has not been influenced by her citizenship, which is regarded as immaterial. *We are unable to see that in this case the plaintiff has been refused any right which the Constitution of the United States confers upon her, and accordingly the judgment is affirmed*" (52 L. ed., at p. 147).

It is manifest that this court regarded *the constitutional clause prohibiting legislative discrimination between its own citizens and citizens of other States* as the *only* constitutional restriction upon a State's right to determine what causes of action arising in another jurisdiction it would entertain in its own courts. Notwithstanding that the "full faith and credit" clause of the constitution (article 4, section 1) was not invoked in that case, it is impossible to view these pronouncements of this court as being other than the most categorical denial that *that clause* commands a State to entertain a suit upon a cause of action created by the statutes of another State. (The New Jersey statute at bar operates equally in cases where the plaintiff is a citizen of New Jersey and where the plaintiff is not a citizen of New Jersey; it is directed not against the suitor but against the cause of action.) Nor can it be said that this pronouncement by this court went beyond the neces-

sities of the case and is therefore *dicta*. The case involved, *inter alia*, a consideration of the meaning and effect of a statute of Ohio (the forum) which permitted such a suit in case *the decedent* was a citizen of Ohio; and in upholding the validity of that statute, this court did so necessarily on the precise ground that the statute was a *proper exercise* by the State of Ohio of *its right to determine "whether and to what extent the State (of Ohio) will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions"* (52 L. ed., at p. 146).

It is not unimportant to add that the three judges who dissented from the majority opinion in that case, did so only on the ground that in their opinion the aforesaid statute of Ohio did discriminate against citizens of other States in violation of article 4, section 2. Even these judges, therefore, did not question the right of a State to exclude transitory causes of action arising under the laws of another State where there was no discrimination in this regard in favor of the State's own citizens as plaintiffs in such suits.

The same rule was again explicitly recognized by the Supreme Court of the United States in the case of *Spokane, etc. Railroad Company* v. *Whitley*, 59 L. ed. 1060, 237 U. S. 487, where the court said:

> "In determining the question now presented, it is apparent that the fundamental consideration is that the right to recover damages for the killing of the decedent was created by the Idaho statute. That right could be enforced in another state, *if the enforcement was not opposed to its policy* (Dennick *v.* Central R. Co., 103 U. S. 11, 26 L. ed. 439; Texas & P. R. Co. *v.* Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905)" (59 L. ed., at p. 1067).

The same rule, although not expressly mentioned, was implicitly followed and applied by this court in the case of *Union Trust Company* v. *Grosman*, 245 U. S. 412, 62 L. ed. 368. The facts in that case were stated by this court, speaking through Justice Holmes, as follows:

> "This is a suit brought by the petitioner in the district court of the United States for the northern district of Texas upon two promissory notes made in Chicago by Hiram Grosman and another, and a continuing guaranty executed in the same place by the respondent, Mrs. Grosman, the wife of Hiram Grosman, as part of the same transaction as the earlier note. A decree was rendered for the plaintiff in the district court; but, upon appeal by Mrs. Grosman, was reversed as against her by the circuit court of appeals, on the ground that it subjected her separate property to the payment of the demand, *contrary to the public policy of the state in which the suit was brought*, 143 C. C. A. 132, 228 Fed. 610, Am. Cas. 1917B, 613. Mrs. Grosman and her husband were domiciled in Texas, as the plaintiff seems to have known, and made the contracts while temporarily in Chicago" (62 L. ed., 370 *et seq.*).

Under *a statute of Illinois*, a married woman could contract in that state as freely as a *feme sole*. Under the law of Texas, however, a married woman could not bind herself by such a contract; and from that fact the United States Supreme Court deduced that "the policy of that state is opposed to such an obligation" (62 L. ed., at p. 371). This court affirmed the action of the Circuit Court of Appeals in holding that the contract *was not enforceable in Texas because it was "contrary to the public policy of the state in which the suit was brought,"* to wit, Texas. (Although

the suit was brought in the Federal court in Texas, the United States Supreme Court regarded the case the same as if it had been brought *in a state court* in Texas, this court saying:

> "If the decree would have been right in a court of the state of Texas, it was right in a District Court of the United States, sitting in the same state. Pritchard *v.* Norton, 106 U. S. 124, 129, 27 L. ed. 104, 105, 1 Sup. Ct. Rep. 102)" (p. 372).

True it is that no question was raised in that case as to whether or not the United States Constitution imposed any obligation upon the State of Texas to enforce the cause of action in that case *because it arose under a statute of another State.* Nevertheless, the *non-enforcement* of that cause of action was so plainly a refusal to give effect to the statute of Illinois that it is impossible to reconcile the decision with any notion that the "full faith and credit" clause would have been held to require an opposite decision if that clause had been invoked. Nor is there any question but that this court rested its decision squarely on the basis of a conflict between the statute of Illinois and the law of Texas. True, the court does consider the possibility that even if the suit had been brought in Illinois the courts of that state *might* have held, on general legal principles, that the law of Texas and not the law of Illinois should govern the contract because the defendant was domiciled there and was only temporarily in Illinois when she signed the contract there. But the decision of this court *was not influenced by that conjectural possibility,* and this court treated the case as one where the courts of Texas *were entirely free to treat the question on the basis of the public policy of Texas.*

The rule under discussion was again recognized by the United States Supreme Court in the case of *Atchison, Topeka, etc. Company* v. *Nichols,* 68 L. ed. 720, 264 U. S. 348. This was an action brought in the State Court of California and removed on the ground of diversity into the Federal Court of California. The suit was based upon a Statute of the State of New Mexico, where the cause of action arose. The defendant railroad company contended that its liability was not enforceable in the State of California because the New Mexico law was *"in conflict with the policy of the State of California."* The United States Supreme Court, construing both the laws of New Mexico and the pertinent laws and decisions of the State of California, *held that the laws of California did not manifest any policy of that State which was in opposition to the enforcement by its Courts of the New Mexico law in question.* The careful and extensive consideration given by this court to the question of whether or not there *was any conflict* between the public policy of California and the law of New Mexico which was sought to be enforced in the California Courts, is the most emphatic recognition of the rule that a state is under no constitutional obligation to entertain suits upon causes of action arising under the laws of other states where to do so would conflict with its own public policy.

An illuminating exposition of what the "full faith and credit clause" of the Constitution does require of each State in the way of giving effect to the statutes of another State, is furnished by the case of *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145, 76 L. Ed., 1026. That was a suit brought in the courts of New Hampshire by a citizen of that State against a corporation of the State of Vermont,

to recover damages under the provisions of the employers' liability statute of New Hampshire (the forum). The case was removed to the Federal court on the ground of the diversity of citizenship. To quote from the opinion of this court:

> "It appeared that the Company had its principal place of business in Vermont and lines extending into New Hampshire; that Leon Clapper, a resident of Vermont, was employed by it there as a lineman for emergency service in either state; and that in the course of his duties, he was sent to restore some burned-out fuses at a substation in New Hampshire and while doing so was killed. The Company, invoking the full faith and credit clause of the Federal Constitution, set up as a special *defense* that the action was barred by provisions of the Vermont Compensation Act; that the contract of employment had been entered into in Vermont, where both parties to it then, and at all times thereafter resided; and that the Vermont Act had been accepted by both employer and employee as a term of the contract.
>
> The District Court ruled that the action was properly brought under the laws of the State of New Hampshire; that the action was based on a tort occurring in that State; and that the Vermont Workmen's Compensation Act had no extraterritorial effect" (at p. 1030).

To quote this court further:

> "The Vermont Workmen's Compensation Act provides that a workman hired within the State shall be entitled to compensation even though the injury was received outside the State, Vermont General Laws, chap. 241, Sec. 5774; that 'employers who hire workmen within this state to work outside of the

> state, may agree with such workmen that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement,' Sec. 5774; that every contract of employment made within the State shall be presumed to have been made subject to its provisions, unless prior to the accident an express statement to the contrary shall have been made, in writing, by one of the parties, Sec. 5765; and that acceptance of the Act is 'a surrender by the parties . . . of their rights to any other method, form or amount of compensation or determination thereof,' Sec. 5763. Neither the Company nor Leon Clapper filed a statement declining to accept any provision of the Vermont Act" (at p. 1031).

Under the *New Hampshire* Workmen's Compensation Act an injured employee was entitled to elect whether to claim compensation under that Statute or to sue for damages at common law; and it was under this provision that plaintiff brought his suit. Thus the Supreme Court was called upon to decide *whether the rights of the parties were controlled by the Vermont Statute or the New Hampshire Statute.* This court put the question thus:

> "The question is whether the fact that the injury occurred in New Hampshire leaves its courts free to subject the employer to liability as for a tort. That is may the New Hampshire courts *disregard the relative rights of the parties as determined by the laws of Vermont* where they resided and made the contract of employment; or must they give effect to the Vermont Act, and to the agreement implied there-

from, that *the only right of the employee* against the employer, in case of injury, shall be the claim for compensation *provided by the statute?*" (of Vermont) (76 L. ed., at p. 1032).

This court proceeds to consider and answer this question as follows:

"If the conflict presented were between the laws of a foreign country and those of New Hampshire, its courts would be free, so far as the restrictions of federal law are concerned, to attach legal consequences to acts done within the State, without reference to the undertaking of the parties, entered into at their common residence abroad, that such consequences should not be enforced between them. But the conflict here is between the laws of two States; and the Company *in setting up as a defense* a right arising under the Vermont statute, invokes Art. 4, Sec. 1, of the Federal Constitution, which declares that 'full faith and credit shall be given in each State to the public acts . . . of every other State.' That a statute is a 'public act' within the meaning of that clause is settled (Citing cases). A federal court sitting in New Hampshire is bound equally with courts of the State to observe the command of the full faith and credit clause, where applicable. The precise question for decision is whether that clause is applicable to the situation here presented. Third. The administratrix contends that the full faith and credit clause is not applicable. The argument is that to recognize the Vermont Act as a defense to the New Hampshire action would be to give to that statute an extra-territorial effect, whereas a State's power to legislate is limited to its own territory. It is true that full faith and credit is enjoined by the Constitution only in respect to those public acts which

are within the legislative jurisdiction of the enacting State. See National Mut. Bldg. & L. Asso. *v.* Brahan, 193 U. S. 635, 647, 48 L. ed. 823, 828, 24 S. Ct. 532; Olmsted *v.* Olmsted, 216 U. S. 386, 395, 54 L. ed. 530, 533, 25 L. R. A. (N. S.) 1292, 30 S. Ct. 292. But, obviously, the power of Vermont to effect legal consequences by legislation is not limited strictly to occurrences within its boundaries. It has power through its own tribunals to grant compensation to local employees, locally employed, for injuries received outside its borders, compare Quong Ham Wah Co. *v.* Industrial Acci. Commission, 255 U. S. 445, 65 L. ed. 723, 41 S. Ct. 373, dismissing writ of error. 184 Cal. 26, 12 A. L. R. 1190, 192 Pac. 1021, and likewise has power to exclude from its own courts proceedings for any other form of relief for such injuries. The existence of this power is not denied. It is contended only that the rights thus created need not be recognized in an action brought in another State; that a provision which Vermont may validly enforce in its own courts need not be given effect when the same facts are presented for adjudication in New Hampshire.

The answer is that such recognition in New Hampshire of the *rights* created by the Vermont Act can not, in any proper sense, be termed an extra-territorial application of that Act. Workmen's compensation acts are treated, almost universally, as creating a statutory relation between the parties—not, like employer's liability acts, as substituting a statutory tort for a common law tort. See Cudahy Packing Co. *v.* Parramore, 263 U. S. 418, 423, 68 L. ed. 366, 369, 30 A. L. R. 532, 44 S. Ct. 153, 23 N. C. C. A. 744; Mulhall *v.* Nashua Mfg. Co. 80 N. H. 194, 197, 115 Atl. 449; Cameron *v.* Ellis Constr. Co., 252 N. Y. 394, 396, 169 N. E. 622; Chandler *v.* Industrial Commission, 55 Utah, 213, 217, 8 A. L. R. 930, 184

Pac. 1020; Anderson *v.* Miller Scrap Iron Co., 169 Wis. 106, 113, 117, 118, 170 N. W. 275, 171 N. W. 935. The relation between Leon Clapper and the Company was created by the law of Vermont; and as long as that relation persisted its incidents were properly subject to regulation there. For both Clapper and the Company were at all times residents of Vermont; the Company's principal place of business was located there; the contract of employment was made there; and the employee's duties required him to go into New Hampshire only for temporary and specific purposes, in response to orders given him at the Vermont office. The mere recognition by the courts of one State that parties by their conduct have subjected themselves to certain obligations arising under the law of another State is not to be deemed an extra-territorial application of the law of the State creating the obligation. Compare Canada S. R. Co. *v.* Gebhard, 109 U. S. 527, 536, 537, 27 L. ed. 1020, 1024, 3 S. Ct. 363. By requiring that, under the circumstances here presented, full faith and credit be given to the public act of Vermont, the Federal Constitution *prevents the employee or his representative from asserting in New Hampshire rights which would be denied him in the State of his residence and employment.* A Vermont court could have enjoined Leon Clapper from suing the Company in New Hampshire, to recover damages for an injury suffered there, just as it would have denied him the right to recover such damages in Vermont. Compare Cole *v.* Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 S. Ct. 269; Reynolds *v.* Adden, 136 U. S. 348, 353, 34 L. ed. 360, 362, 10 S. Ct. 843. The rights created by the Vermont Act are entitled to like protection *when set up in New Hampshire by way of defense to the action brought there.* * * * It is urged that the provision of the Vermont statute which forbids

resort to common law remedies for injuries incurred in the course of employment *is contrary to the public policy of New Hampshire; that the full faith and credit clause does not require New Hampshire to enforce an act of another State which is obnoxious to its public policy;* and that a federal court sitting in that State may, therefore, decline to do so. Compare Union Trust Co. *v.* Grosman, 245 U. S. 412, 62 L. ed. 368, 38 S. Ct. 147. It is true that the full faith and credit clause does not require the enforcement of every right conferred by a statute of another State. There is room for some play of conflicting policies. *Thus, a plaintiff suing in New Hampshire on a statutory cause of action arising in Vermont might be denied relief because the forum fails to provide a court with jurisdiction of the controversy;* see Chambers *v.* Baltimore & O. R. Co., 207 U. S. 142, 148, 149, 52 L. ed. 143, 146, 147, 28 S. Ct. 34; compare Douglas *v.* New York, N. H. & H. R. Co., 279 U. S. 377, 73 L. ed. 747, 49 S. Ct. 355; or because it fails to provide procedure appropriate to its determination, see Tennessee Coal, Iron & R. Co. *v.* George, 233 U. S. 354, 359, 58 L. ed. 997, 999, L. R. A. 1916D, 685, 34 S. Ct. 587; compare Slater *v.* Mexican Nat. R. Co., 194 U. S. 120, 128, 129, 48 L. ed. 900, 903, 904, 24 S. Ct. 581; *or because the enforcement of the right conferred would be obnoxious to the public policy of the forum,* compare Bothwell *v.* Buckbee, M. Co., 275 U. S. 274, 277-279, 72 L. ed. 277, 279, 280, 48 S. Ct. 124; Union Trust Co. *v.* Grosman, 245 U. S. 412, 62 L. ed. 368, 38 S. Ct. 147; Bond *v.* Hume, 243 U. S. 15, 25, 61 L. ed. 565, 569, 37 S. Ct. 366; Converse *v.* Hamilton, 224 U. S. 243, 260, 261, 56 L. ed. 749, 755, 756, 32 S. Ct. 415, Ann. Cas. 1913D, 1292, or because the liability imposed is deemed a penal one, see Galveston, H. & S. A. R. Co. *v.* Wallace, 223 U. S. 481, 490, 5 L. ed. 516, 522, 32 S. Ct. 205; compare

> Stewart *v.* Baltimore & O. R. Co., 168 U. S. 445, 448, 42 L. ed. 537, 538, 18 S. Ct. 105. *But the Company is in a position different from that of a plaintiff who seeks to enforce a cause of action conferred by the laws of another State.* The right which it claims should be given effect *is set up by way of defense to an asserted liability; and to a defense different considerations apply.* Compare Home Ins. Co. *v.* Dick, 281 U. S. 397, 407, 408, 74 L. ed. 926, 933, 934, 74 A. L. R. 701, 50 S. Ct. 338. A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect *to a substantive defense under the applicable law of another State,* as under the circumstances here presented, subjects *the defendant* to irremediable *liability. This* may not be done" (76 L. ed., at p. 1032 *et seq.*).

Here, then, is the fullest and most explicit declaration by this court that the "full faith and credit" clause of the United States Constitution does not prohibit a state from denying "relief" to "*a plaintiff suing on a statutory cause of action arising*" *under the statutes of another State,* but that, on the contrary, a State has a right to refuse to enforce such a cause of action for any one of various reasons, including, specifically, the reason that "the enforcement of the right conferred would be obnoxious to the public policy of the forum." Without more, this decision is dispositive of the related question in the case at bar.

But the force of this decision for our purposes is not yet spent. To repeat what we have already shown, this court holds there that the "full faith and credit" clause requires *only* that when a State court *does entertain a suit* which

involves rights claimed by the parties under the controlling laws of another State, that court "may not disregard the relative rights of the parties as determined by the laws of" the other State (provided, of course, those laws control, as being, for instance, *lex loci contractus*). But even this ruling was limited by the court. For by plainest implication, if not explicity, the court seems to confine its holding *in this regard* to cases where the law of the foreign State is not contrary to the public policy of the State in which the suit is brought. This is manifest from the fact that, after reaching its determination that the "full faith and credit" clause was applicable to the case, the court goes on to show that the statute of Vermont *was not contrary to the public policy of New Hampshire* (the forum). In this connection, the court says:

> "Moreover, there is no adequate basis for the lower court's conclusion that to deny recovery would be obnoxious to the public policy of New Hampshire. No decision of the state court has been cited indicating that recognition of the Vermont statute would be regarded in New Hampshire as prejudicial to the interests of its citizens. In support of the contention that the provision of the Vermont Act is contrary to the New Hampshire policy, it is urged that New Hampshire's compensation law is unique among workmen's compensation acts in that it permits the injured employee to elect, subsequent to injury, whether to bring a suit based upon negligence or to avail himself of the remedy provided by the Act; and that the legislature of New Hampshire has steadily refused to withdraw this privilege. But the mere fact that the Vermont legislation does not conform to that of New Hampshire does not establish that it would be obnoxious to the latter's public policy to

> give effect to the Vermont statute in cases involving only the rights of residents of that State incident to the relation of employer and employee created there. Northern P. R. Co. *v.* Babcock, 154 U. S. 190, 198, 38 L. ed. 958, 960, 14 S. Ct. 978. Nor does sufficient reason appear why it should be so regarded. The interest of New Hampshire was only casual. Leon Clapper was not a resident there. He was not continuously employed there. So far as appears, he had no dependents there. It is difficult to see how the State's interest would be subserved, under such circumstances, by burdening its courts with this litigation" (76 L. ed. 1036-1037).

Our interpretation of the decision in this particular regard is confirmed by the concurring opinion of Justice Stone which seems avowedly to be occasioned by a consideration of this very thing. Says Justice Stone:

> "I agree that in the circumstances of the present case, the courts of *New Hampshire, in giving effect to the public policy of that state, would be at liberty to apply the Vermont statute and thus, by comity, make it the applicable law of New Hampshire.* In the absence of any controlling decision of the New Hampshire courts, I assume, *as does the opinion of the Court,* that they would do so and that what they would do we should do. Hence, it seems unnecessary to decide whether that result *could be compelled, against the will of New Hampshire, by the superior force of the full faith and credit clause*" (76 L. ed., 1037).

It may not be inappropriate to call attention to the one and only decision in the State courts which we have found dealing squarely with the question here at bar. That was the case of *Dougherty* v. *American McKenna Process Co.,*

255 Ill. 369, 99 N. E. 619 (Illinois Supreme Court). We beg leave to quote from the court's opinion in that case as follows:

> "This is a suit brought in the circuit court of Will county by the administrator of the estate of John Dougherty, deceased, to recover damages for the death of plaintiff's intestate. The declaration avers that the deceased, while a citizen and resident of Illinois, was injured while in the employ of the American McKenna Process Company at Elizabeth, New Jersey, and died in the latter state from the effect of his injury. Letters of administration on his estate were granted by the probate court of Will county. This suit is based upon the injuries act of New Jersey, which is set out in the declaration. A general demurrer thereto was *sustained* by the trial court on the ground that Section 2 of the injuries act of Illinois, which provides that 'no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state' (Hurd's Rev. Stat. 1911, p. 1290), *prohibited the bringing of this action in Illinois.*
>
> * * * * * *
>
> "A further contention of counsel is that if this statute applies to actions brought here, based upon the statute of another state, then it is in contravention of Section 1 of article 4 of the United States Constitution, which provides that 'full faith and credit shall be given, in each state, to the public acts, records, and judicial proceedings of every other state,' and also of paragraph 1 of section 2 of said article, which provides that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.'

"Whatever force and obligation the laws of one country have in another depend solely on the laws and municipal regulations of the latter. Story, Confl. L. 8th ed. Section 23. The several states of the Union are not in every respect independent; many of the rights and powers which originally belonged to them being now vested in the government created by the Federal Constitution. Except, however, 'as restrained and limited by that instrument, they possess and exercise the authority of independent states.' Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565. It was not intended by the provisions of the Federal Constitution relied on by counsel, to give to the laws of one state any operation in other states except by a permission, express or implied, by those states. Paul *v.* Virginia, 8 Wall. 168, 19 L. ed. 357. Laws are without force beyond the jurisdiction of the state which enacts them, and can have no extraterritorial effect except by a comity of other states. Huntington *v.* Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

"This rule applies with full force to statutes giving a right of action for death by the wrongful act of another. If they are administered outside of the state where they are enacted, it is only on the principles of comity. In this country the courts will generally enforce the law of the place where the injury occurred, unless to do so is contrary to the law, morals, or policy of the forum (citing cases). If the policy of the forum has been expressed positively in a statute, that policy must prevail. When the legislature speaks upon a subject upon which it has constitutional power to legislate, public policy is what the statute indicates (citing cases). Each state, subject to restrictions of the Federal Constitution, determines the limits of the jurisdiction of its courts,

the character of the controversies which shall be heard in them, and how far its courts having jurisdiction of the parties shall hear and decide transitory actions where the cause of action has arisen outside of the state. St. Louis, I. M. & S. R. Co. *v.* Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464. Different states may have different policies, and the same state may have different policies at different times, provided that any policy the state may choose to adopt must operate the same way on its own citizens and those of other states. Chambers *v.* Baltimore & O. R. Co., 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34. In this last case it was held that a statute of Ohio providing that no action could be maintained in that state for wrongful death occurring in another state, except where the deceased was a citizen of Ohio, did not violate the Federal Constitution. A dissenting opinion, joined in by three members of the court in effect conceded that, had the Ohio court excluded from the courts of that state all actions for personal injuries arising in other states, it would have been constitutional. The reasoning of that decision as to the right of a state to exclude actions of the kind here in question fully sustains the validity, under the Federal Constitution, of the provision of the injuries act above referred to."

Even if the rule thus recognized in the foregoing cases had never been enunciated, there would still be adequate authoritative ground on which to rest a holding that the "full faith and credit" clause of the Constitution does not require each State to entertain suits based on causes of actions created by the statutes of other States. We allude to the long-since settled view of this court that the "full faith and credit" clause of the Constitution "*establishes*

a rule of evidence rather than of jurisdiction." Thus in the case of *Anglo-American Provision Company* v. *Davis Provision Company,* 191 U. S. 373, 48 L. ed. 225, this court, speaking by Justice Holmes, said:

> "We are of the opinion that the section of the Code as construed is not unconstitutional. The precise point has not been decided by this court, but it has been laid down in cases which raise greater difficulties than the present, that this provision of the Constitution establishes *a rule of evidence rather than of jurisdiction.* Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 291, 32 L. ed. 239, 243, 8 Sup. Ct. Rep. 1370; Andrews *v.* Andrews, 188 U. S. 14, 36, 47 L. ed. 366, 371, 23 Sup. Ct. Rep. 237. The Constitution does not require the state of New York to give jurisdiction to the supreme court against its will. *If the plaintiff can find a court into which it has a right to come,* then the effect of the *judgment* is fixed by the Constitution and the act in pursuance of it which Congress has passed. Rev. Stat. Sec. 905 (U. S. Comp. Stat. 1901, p. 677). But the Constitution does not require the state to provide such a court" (48 L. ed., at p. 227).

The same view had been previously expressed by this court in the case of *Huntington* v. *Attrill,* 146 U. S. 657, 36 L. ed. 1123, where the court said:

> "Whether the Court of Appeals of Maryland gave full faith and credit to the *judgment* recovered by this plaintiff in New York depends upon the true construction of the provisions of the Constitution and of the Act of Congress upon that subject.
>
> "The provision of the Constitution is as follows: 'Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings

of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.' Art. 4, Sec. 1.

"This clause of the Constitution, like the less perfect provision on the subject in the Articles of Confederation, as observed by Mr. Justice Story, 'was intended to give the same conclusive effect to judgments of all the states, so as to promote uniformity, as well as certainty, in the rule among them;' and had three distinct objects: first, to declare and by its own force establish, that full faith and credit should be given to the judgments of every other State; second, to authorize Congress to prescribe the manner of authenticating them; and third, to authorize Congress to prescribe their effect when so authenticated. Story, Const. Secs. 1307, 1308.

"Congress, in the exercise of the power so conferred, besides prescribing the manner in which *the records and judicial proceedings* of any State may be authenticated, has defined the effect thereof, by enacting that 'the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from which they are taken.' Rev. Stat., Sec. 905, re-enacting Act of May 26, 1790, Chap. 11, 1 Stat. at L. 122.

"These provisions of the Constitution and laws of the United States are necessarily to be read in the light of some established principles, which they were not intended to overthrow. They give no effect to judgments of a court which had no jurisdiction of the subject-matter or of the parties. D'Arcy *v.* Ketchum, 52 U. S. 11 How. 165 (13: 648); Thompson *v.* Whitman, 85 U. S. 18 Wall. 457 (21: 897). *And they confer no new jurisdiction on the courts of*

any State; and therefore do not authorize them to take jurisdiction of a suit or prosecution of such a penal nature, that it cannot, on settled rules of public and international law, be entertained by the judiciary of any other State than that in which the penalty was incurred. Wisconsin *v.* Pelican Ins. Co. above cited.

"Nor do these provisions put the judgments of other states upon the footing of domestic judgments, to be enforced by execution; but they leave the manner in which they may be enforced to the law of the State in which they are sued on, pleaded or offered in evidence. McElmoyle *v.* Cohen, 38 U. S. 13 Pet. 312, 325 (10: 177, 183). But when duly pleaded and proved in a court of that State, they have the effect of being *not merely prima facie evidence, but conclusive proof,* of the rights thereby adjudicated; and a refusal to give them the force and effect, *in this respect,* which they had in the State in which they were rendered, denies to the party a right secured to him by the Constitution and laws of the United States" (36 L. ed., at pp. 1133-1134).

In the case of *State of Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 32 L. ed. 239, this court said:

"The application of the rule to the courts of the several States and of the United States is not affected by the provisions of the Constitution and of the Act of Congress, by which the *judgments* of the courts of any State are to have such faith and credit given to them in every court within the United States as they have by law or usage in the State in which they were rendered. Const. art. 4, sec. 1; Act May 26, 1790, chap. 11, 1 Stat. at L. 122; Rev. Stat. Sec. 905.

"Those provisions establish a rule of evidence, rather than of jurisdiction. While they make the

record of a judgment, rendered after due notice in one State, conclusive evidence in the courts of another State, or of the United States, of the matter adjudged, they do not affect the jurisdiction, either of the court in which the judgment is rendered, or of the court in which it is offered in evidence. Judgments recovered in one State of the Union, when proved in the courts of another government, whether State or national, within the United States, differ from judgments recovered in a forein country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. Hanley *v.* Donoghue, 116 U. S. 1, 4 (29: 535, 536).

"In the words of Mr. Justice Story, cited and approved by Mr. Justice Bradley, speaking for this court, 'The Constitution did not mean to confer any new power upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence'" (32 ed., at p. 244).

If that is the true meaning and effect of the "full faith and credit" clause in its application to foreign judgments, *a fortiori* is such its meaning and effect in the case of foreign statutes. Such being the nature and operation of the "full faith and credit" clause, obviously it can require no more than this: that when a court of one State does entertain a suit which involves a matter as to which the rights of the parties are, on general legal principles, governed by the statutes of another State, the court (of the forum) shall permit those statutes *to be put in evidence* and shall accord

to them *the probative effect of establishing those rights.* This requirement, however, is far different from a mandate to the courts of each State *in invitum to take jurisdiction* of suits based upon causes of action created by the statutes of other States.

Discussion of appellant's argument relating to the application of the "full faith and credit" clause of the United States Constitution to the case at bar.

Appellant's argument on this score is set forth in appellant's brief at pages 38 to 71, inclusive. Up to page 38 of his brief, the arguments advanced and authorities cited by appellant seem to have no important bearing on any federal question involved in this appeal; and we therefore consider it unnecessary to discuss those arguments and authorities.

Appellant first argues the proposition that because the "interests and property rights" involved in this case are "nation wide," it follows that a nation wide effect should be given to the liability created by the New York Banking Law by enforcing it in all the States. (Brief, pp. 38 *et seq.*). Obviously, this argument is not, and cannot be, predicated upon any constitutional ground. At most, it suggests that a nation wide enforcement of the New York Banking Law is to be desired, but not that it is to be constrained. The case of *Pulsifer* v. *Greene,* 96 Me. 438, cited by appellant (Brief, p. 39), merely holds that an action to enforce such a liability is *transitory.* That case does not touch upon the question as to the right of any other state to refuse to entertain such a suit in its courts. The same comment applies to the case of *Lewisohn* v. *Stoddard,* 78 Conn. 575, which appellant cites on page 41 of his brief. Moreover,

if that case be viewed as holding that state courts are compelled to entertain suits based on causes of action arising under the statutes of another state because otherwise "a fatal defect would exist in the American system of remedial procedure" (Brief, p. 41), it is sufficient to remark that such a holding would be "fatal" *to the American political system;* for it would abolish the sovereignty of the states and change our political system from a *federal* to a *national* character. Appellant asserts (Brief, p. 42) that in cases where state courts "have refused to permit enforcement of assessments levied under the laws of different (other) states, * * * this Court has repeatedly held that under the full faith and credit clause of the United States Constitution such states must recognize and give effect to the laws of the state of incorporation" (Brief, p. 42). But appellant cites no cases in support of this assertion, and the fact is, as will hereinafter appear, that the cases which appellant has in mind are all cases where the "assessments" were *judicial assessments,* that is to say, *judgments of a court.* Such a *judgment* of another state, as we shall show, stands on a wholly different footing from a *statute* of another state as regards the effect which the United States Constitution requires that it be given by the courts of other States.

Appellant next cites and quotes from the case of *Royal Arcanum* v. *Green,* 237 U. S. 531, 59 L. ed. 1089 (Brief, p. 42), as if that were a case whose *ratio decidendi* was "the paramount necessity of giving national effect to the law of the state of incorporation." Such is not the fact. The plaintiff in that case, a citizen and resident of New York, was a member of a fraternal beneficial corporation organized under the laws of Massachusetts. Plaintiff was

affiliated with one of the branch lodges of this organization which was located in New York. His membership imposed on him, *inter alia*, an obligation to pay a specified monthly assessment. Several years after he joined, the amount of his monthly assessment was increased by corporate action duly taken in accordance with the corporation's constitution and by-laws. For some years plaintiff paid this increased assessment, doing so latterly under protest. Finally he ceased making these payments and instituted a suit (to quote the court) "assailing the validity of the increase in the rate of assessment made in 1905 on the ground that it was void, as exceeding the powers of the corporation, and because conflicting with his contract rights as a member of the corporation and a certificate holder. The prayer of the bill was * * * that the corporation be confined to the rate of assessment established by the amendment adopted in 1898, and that the complainant be decreed to have a contract right to pay only that sum monthly in discharge of his duty to pay assessments, and that the corporation and its officers be enjoined during his life from exacting any greater sum, or in any way suspending him for refusing to pay the amount fixed by the amendment of 1905" (59 L. ed., at 1098). Four years previous to this suit, certain other members of the organization had instituted a substantially similar suit in the courts of Massachusetts and in that suit it was determined "that the increase complained of was valid, impaired no contract right of the certificate holders, and was entitled to be enforced" (59 L. ed., at p. 1097). The *defendant* set up *the defense* "that the rights of the plaintiff in respect to his contract with the said defendant and his membership in the defendant order, and the changes adopted by it, were

and are concluded and determined by the aforesaid *judgment* of the supreme judicial court of Massachusetts; that under the Constitution of the United States the same is entitled to full faith and credit in the State of New York, and that the complaint should be dismissed" (59 L. ed., at p. 1098). At the trial an exemplified copy of the Massachusetts *proceedings and judgment* was offered in evidence but *excluded* by the court and the said *defense* was overruled, *on the ground that the plaintiff's "rights" were controlled by the law of New York and not the law of Massachusetts.* The trial court's action was affirmed by the New York Court of Appeals "on the ground *that the law of New York governed* and established under the circumstances disclosed the right of the complainant to the relief which had been awarded him" (59 L. ed., at p. 1099). Defendant appealed to the United States Supreme Court, claiming that the New York courts had failed to give "due effect" *to the Massachusetts judgment* as required by the full faith and credit clause of the United States Constitution. By way of stating the question presented for its decision, the United States Supreme Court said:

> "And as what was the due effect to be given to the *judgment* depended, as we shall hereafter more particularly point out, upon whether the Massachusetts law controlled the parties, since if it did, the judgment would be entitled to one effect, and if it did not, to another effect, it follows that the claim as to constitutional right concerning the judgment also *involved deciding whether the Massachusetts law controlled.* It follows that in both aspects the claim of full faith and credit under the Constitution of the United States was asserted, and *whether the court below erred in holding that that clause was in-*

> *applicable because the contract was a New York contract governed by New York law is the question for decision.* And the solution of that question involves two considerations: first, was the controversy to be determined with reference to the Massachusetts charter and laws and judgment; and second, if yes, did they sustain the right of the corporation to make the increased assessment complained of" (at p. 1100).

Reasoning on principle, this court reached the conclusion that *as a matter of general law,* the validity of the corporate action increasing the monthly assessment and the resultant obligation of plaintiff to pay the increased amount *was to be determined by "the charter of the corporation and the laws of the State under which it was granted"* (that is, Massachusetts) (59 L. ed., at p. 1100). Referring next to the authority of the decided cases, this court adverts to "a line of decisions" which "by the application of the same principal" (of general law) establish that the liability of a stockholder to pay an assessment on his stock subscription is governed by the laws of the State of the corporation's domicile as well as by judicial proceedings taken therein to determine the necessity and amount of such assessment (59 L. ed., at p. 1101). Hence the court concludes that the answer to the first of the two questions involved, *viz*: "was the controversy to be determined with reference to the Massachusetts charter and laws and judgment" (59 L. ed., at p. 1100) was "Yes". To the other question, *viz*: "did *they* sustain the right of the corporation to make the increased assessment complained of?" (59 L. ed., at p. 1100), this court finds a ready answer in the *judgment* of the Massachusetts court which so held. Since the controversy was governed by the Massachusetts

law and since the Massachusetts judgment had adjudicated that, according to the Massachusetts law, the assessment in question was valid, this court held that the "full faith and credit clause" of the United States Constitution required the courts of New York to give effect to that *judgment* by upholding the validity of the assessment in the suit before it. The entire holding in the case may be summarized as follows: Where a court in one State entertains a suit which involves a matter as to which *the rights of the parties* are, on general principles of law, governed by the statutes of another State, and *those rights have been adjudicated* by a court in that other State by a judgment which, by the law of that State *and on general principles of law,* is binding on the parties in the suit, at bar, the court is bound by the Constitution of the United States to treat the parties' rights as *settled by the foreign law and judgment.* The case is in all essentials exactly like the case of *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145, 76 L. ed., 1026, which we have hereinabove discussed. Like that case, it sustained *a defense* based upon rights arising under the statute of another State and governed by that statute, on general principles of law. Indeed, the case under discussion is far weaker even than the *Bradford* case, *supra,* so far as this appellant is concerned. For in that case this court, on constitutional grounds, compelled the State court to recognize (as a *defense*) rights arising under a foreign statute *unaided by any foreign judgment establishing those rights,* whereas in the case under discussion, the decision rests upon the constitutional requirement of giving due effect *to a foreign judgment.* As we shall hereinafter show, the effect which the United States Constitution requires one State to give to the judgment of another State is far dif-

ferent from the effect which it requires in the case of foreign statutes. Since, as we have shown, the *Bradford* case, *supra*, lends no support to the appellant, *a fortiori* the case under discussion does not do so.

Appellant next cites (Brief, p. 47, *et seq.*) the case of *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544, 69 L. ed. 783, as if it lent support to the same proposition for which appellant cites the case of *Royal Arcanum* v. *Green*, *supra*. The opinion in the case is so comparatively short that for the sake of clarity we beg leave to quote it *in toto:*

> "This is a suit by the beneficiary of a certificate issued by a fraternal beneficiary society incorporated in *Illinois*. The member to whom the certificate was issued was the plaintiff's husband, and the ground of recovery is that the husband had disappeared and had not been heard of for ten years before this suit was brought. His expectancy of life according to the tables had not expired, and *the defense* is a by-law of the corporation to the effect that 'long-continued absence' of any member unheard of shall not . . . give any right to recover on any benefit certificate . . . until the full term of the member's expectancy of life, according to the National Fraternal Congress Table of Mortality, has expired, . . . and this law shall be in full force and effect, any statute of any state or country or rule of common law of any state or country to the contrary, notwithstanding.'
>
> "The only facts that need be mentioned are that the certificate seems to have been issued in *South Dakota*, although there was no allegation or proof concerning the law of that state, and that it was issued in 1901, while the by-law relied upon was not adopted until 1908. But *the by-law has been held valid and binding upon the members of the corpora-*

tion by the supreme court of Illinois, although they had become members before the change. Steen *v.* Modern Woodmen, 296 Ill. 104, 17 A. L. R. 406, 129 N. E. 546. The supreme court of *Nebraska* affirmed a judgment *for the plaintiff,* seemingly, from the cases cited, on the ground either that the rule of evidence must be determined by the *lex fori,* or, more probably, *that the by-law was unreasonable.* 111 Neb. 334, 197 N. W. 129. *The result is that if the validity of the by-law ought to be determined by the laws of Illinois, the plaintiff is allowed to recover upon a state of facts which the contract expressly stipulates shall not give her that right.* A writ of certiorari was issued by this court. 265 U. S. 576, 68 L. ed. 1187, 44 Sup. Ct. Rep. 455.

"The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced, and the consequence that their rights must be determined by a single law, is elaborated in Supreme Council, R. A. *v.* Green, 237 U. S. 531, 542, 59 L. ed. 1089, 1100, L. R. A. 1916A, 771, 35 Sup. Ct. Rep. 724. The act of becoming a member is something more than a contract,—it is entering into a complex and abiding relation,—and as marriage looks to domicil, membership looks to *and must be governed by the law of the state granting the incorporation. We need not consider what other states may refuse to do,* but we deem it established that *they cannot attach* to membership *rights against the company* that are refused *by the law of the domicil.* It does not matter that the member joined in another state. In the above-cited case Green became a member of a Massachusetts corporation in New York, and the state court held on ordinary principles of contract that his rights were governed by New York law. Green *v.* Supreme Council, R. A. 206 N. Y. 591, 597, 100 N. E. 411. But

> the decision was reversed, and it was held a failure to give full faith and credit to the Massachusetts charter as construed by the Massachusetts court that Green *was relieved by decree from paying assessments* increased by the corporation after his contract was made. We are of opinion that the decision in that case governs this, and that the judgment must be reversed." (69 L. ed., at p. 784 *et seq.*)

Obviously, this case also is essentially similar to the case of *Bradford Electric Light Co.* v. *Clapper* (where it is cited), *supra*, both in respect of the legal situation involved and the rule of law applied. Further comment is unnecessary.

Appellant refers to and cites (Brief, p. 48 *et seq.*) the case of *Whitman* v. *National Bank of Oxford*, 176 U. S. 559, 44 L. ed. 587, as a case where the "basic views" which the New Jersey statute at bar "embodies in statutory form * * * were rejected by this court under the full faith and credit clause of the United States Constitution" (Brief, pp. 50-51). In making this assertion, appellant errs. That was a suit brought in the federal court in New York against a New York resident by a judgment creditor of a Kansas corporation of which defendant was a stockholder. The object of the suit was to enforce a statutory stockholder's liability created by the Kansas constitution and statutes. To quote this court:

> "The defendant moved the circuit court of the United States to direct a verdict in his favor, upon the ground that it had no jurisdiction to enforce a statutory remedy of the state of Kansas. The court denied the motion, directed a verdict for the plaintiff, overruled a motion for a new trial, and entered a final judgment for the plaintiff. 76 Red. Rep. 697.

> That judgment was affirmed by the circuit court of appeals. 51 U. S. App. 536, 83 Fed. Rep. 288, 28 C. C. A. 404. The defendant thereupon applied for and obtained this writ of certiorari" (44 L. ed., at p. 589).

The question presented *was purely one of general law,* and did not involve any federal or constitutional question. The question was whether or not the plaintiff's cause of action created by the Kansas statute was "contractual in its nature" and *hence transitory.* This court held that

> "The liability which by the Constitution and statutes is thus declared to rest upon the stockholder, though statutory in its origin, is contractual in its nature" (44 L. ed., at p. 590).

and held further that

> "The right of the plaintiffs to sue upon this liability in any court having jurisdiction of the subject-matter and the parties is therefore clear" (44 L. ed., at p. 591).

For *this statement,* this court cited as authority the case of *Dennick* v. *Central R. Co.,* 103 U. S. 11, 26 L. ed. 439, wherein this court held, *on general legal principles* and without reference to any constitutional requirement, that a statutory cause of action which was transitory in character could be "pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties" (26 L. ed., at p. 441). The holding of the case under discussion, therefore, is simply that where a cause of action is created by the statutes of one State and is based upon a liability which is contractual in its nature, the cause of action, notwithstanding its "statutory origin," *is transitory*

and is *therefore* suable in the courts of other states. Such a holding says nothing on the constitutional question of whether or not such a cause of action is suable in the courts of another state *against the will of that State, as where it is in conflict with the latter's public policy.* The case, therefore, clearly does not, as appellant claims, "reject" the "view" that *a state may lawfully refuse to entertain such a suit in its courts.*

Appellant cites and quotes from the case of *Hancock National Bank* v. *Farnum,* 176 U. S. 640, 44 L. ed. 619 (Brief, p. 55) and asserts that that case is authority for the proposition that "all States must permit enforcement of additional stockholders' liabilities created by the laws of other States" (Brief, p. 55).

Not so. In order to understand the holding in that case, it is necessary to examine the opinion of the court below (20 R. I. 466; 40 Atl. 341):

> "The declaration sets out that the plaintiff is a creditor of the Commonwealth Loan & Trust Company, a corporation under the laws of Kansas, upon a judgment of the United States district court for the district of Kansas; that execution issued on said judgment, which has been returned unsatisfied; that the defendant holds 10 shares of the stock of said company, of the par value of $100 each; that he owes the plaintiff the sum of $1,000, under the laws of Kansas, which provide that execution for an amount equal to his stock may issue against a stockholder when property of the corporation cannot be found whereon to levy an execution against the corporation, or that the plaintiff may proceed by action to charge the stockholder; that by the constitution of Kansas, and by decisions of its supreme court, the liability of the stockholder is contractual, several, and transi-

tory; and that, having been so decided, under the provisions of the constitution of the United States an action on such liability may be had in this state. Article 12, Sec. 2, of the constitution of Kansas; article 4, c. 23, par. 1192, of the Kansas General Statutes; and the decisions of the supreme court of Kansas in Howell *v.* Manglesdorf, 33 Kan. 194, 5 Pac. 759, Abbey *v.* Dry-Goods Co., 44 Kan. 415, 24 Pac. 426, and Wells *v.* Robb, 43 Kan. 201, 23 Pac. 48,—are made a part of the declaration. The defendant demurs to the declaration. The plaintiff does not claim that a purely statutory liability in one state is a cause of action in another state, but that when it is of a contractual nature, or of a kind adapted to the lex fori, it is a cause of action. Accordingly it seeks to bring this case within the contractual class, and its proposition is this: The law is construed in Kansas to constitute a contract. Full faith and credit must be given to this construction, as a judicial proceeding, in other states. Hence the plaintiff is entitled to enforce in this state the liability of a stockholder in a Kansas corporation, as on a contract. The argument is pressed with ability and plausibility, but we are not able to see that it is applicable to this case. The declaration does not aver that the defendant has made a contract, nor that the law under which the corporation exists has made him a contracting party, but that an opinion of the supreme court of Kansas says that the relation between a stockholder and a corporation creditor is that of a contract. The provision of the federal constitution relates to statutes, judgments, and decrees. These are the things which are to have full faith and credit in the several states. Opinions of courts are not judgments; and although a court, in the interpretation of the statutes of its own state, will

be followed by other courts, there is no rule of comity or law that a court should be followed when its opinion is given simply upon its interpretation of general legal principles. Still less would an opinion be binding when it is not a decision, but merely a dictum. It does not appear to us that the opinion of the supreme court of Kansas, which is relied on in this case on the matter of contract, was, as to that question, anything more than a dictum. • • • Assuming, however, that the opinion of the supreme court of Kansas is that the relation of a stockholder to creditors is contractual, it is not a binding opinion upon us; it is not a judgment, to which full faith and credit must be given, under the federal constitution; and, giving to it the high respect which is due to the court from which it comes, it still falls short of establishing, as a matter of pleading in this declaration, the fact of a contract by the defendant, in Kansas, by virtue of the statute. • • • From this examination, we think it sufficiently appears that the declaration states no case of a contract under the decisions of the supreme court of Kansas, or the constitution of the state.

"We come then to the question whether we can construe the statute of Kansas to create a contractual relation.

• • • • • • •

"We are aware that the greater number of cases call the liability a contract, and undoubtedly the relation of a stockholder to a corporation has certain equitable features both of a contract and a guaranty; but we think it much more accurate to say that the liability is a statutory liabili[illegible], imply, incidental to the ownership of stock, than to say that it is a contract. In Rice *v.* Hosiery Co., 56 N. H. 114, the court says: 'The liability which the plaintiff seeks to en-

force is a mere creature of the statute, having none of the elements of a contract, whether express or implied. It is a naked statutory liability, entirely unknown to the common law, for the indebtedness of the corporation, however it may accrue,—whether for the breach of a contract, or the commission of a tort. The stockholder is not liable upon the contract in one case, nor for the tort in the other, but, under the statute, for the debt against the corporation which may grow out of either.' As this view is so clearly founded in reason, and as this court has already decided in Sayles *v.* Bates, *supra*, that the liability is not a contract, we do not feel called upon to change that decision, even though the majority of courts may hold the other way. It follows, therefore, that the declaration does not state a contract under the law of Kansas, as construed by the decisions of the supreme court of that state to which we have been referred, nor by our own construction of it" (40 Atl., 342 *et seq.*).

Clearly the State court merely purports to decide a *question of general law*, viz: that plaintiff's complaint did not state a legal cause of action because it set forth a claim based upon "a purely statutory liability" and not a liability "of a contractual nature" *and hence not enforceable in any other state than Kansas.* In other words, the State court decided that Plaintiff's claim was one which, so to speak, died at the boundaries of its creative State and had no vitality elsewhere. In rejecting that decision the United States Supreme Court begins its opinion with a reference to the case of *Whitman* v. *National Bank of Oxford*, 176 U. S. 559, 44 L. ed. 587, discussed hereinabove, wherein it was held that *on general principles of law* such a cause of action *was transitory*, and hence suable in the courts of

other States. Following the authority of the cited case, this court in the case under discussion holds likewise as to the claim at bar, thereby disagreeing with the holding of the Rhode Island court below. So holding, this court then proceeds to ask the question of whether or not the Rhode Island court, in holding to the contrary, denied any right secured by the "full faith and credit" clause of the United States Constitution, this court conceding that "if it finds that no such right was denied, the judgment will have to be affirmed, no matter what may be the opinion of this court as to the correctness of the ruling *as a question of general law*" (44 L. ed., at p. 621). The court then adverts to the *judgment* recovered by the plaintiff in the courts of *Kansas* against the corporation (of which defendant was a stockholder) and observes that under Sec. 1, Art. 4, of the United States Constitution, *that judgment* is entitled to be given *the same effect in Rhode Island that is given to it in Kansas.* Since in Kansas the judgment had the effect of entitling the plaintiff to bring suit against defendant on the claim in question, this court held that *the same effect* must be given to that *judgment* in the courts of *Rhode Island.* The court concludes as follows:

> "We are of the opinion, therefore, that the supreme court of Rhode Island has failed to give to the *judgment* in the circuit court of the United States for the district of *Kansas* that force and effect which *it* has within the limits of the State of *Kansas,* and that the faliure so to do is an error available in this court" (44 L. ed. 622).

Thus it is demonstrated that the case under discussion is not, as appellant claims, authority for the proposition "that all States must permit enforcement of additional

stockholders' liabilities created by the laws of other States" (Brief, p. 55), but is merely authority for the proposition that each State must permit the enforcement of such a liability *where a refusal to do so would fail to give effect to a judgment* of the other State as required by the Constitution and the related act of Congress. In the case at bar, of course, there is no such judgment in the foreign State (New York).

That the existence of the foreign judgment was the decisive feature of that case was explicitly declared by this court in the later case of *Finney* v. *Guy*, 189 U. S. 335, 47 L. ed. 839, where this court, referring to that case said:

> "In the second case it was again held that under the statute and the decisions of the Kansas courts, after a judgment had been obtained against the corporation and an execution returned unsatisfied, the individual creditor could maintain an action against a single stockholder in any court of competent jurisdiction. Having the right to maintain such action, it was held that when it was commenced in another state and in a proper court thereof, the judgment which was obtained in Kansas must have the same faith and credit given it in the courts of another state that was given it in Kansas" (47 L. ed., at p. 845).

The same view of the case in question was expressed by this court again in the case of *Converse* v. *Hamilton*, 224 U. S. 243, 56 L. ed. 749, where this court, referring to that case, said:

> "When the case came here, it was held that full faith and credit had not been given to the Kansas judgment upon which the creditor relied, and the judgment of the supreme court of Rhode Island was

> accordingly reversed, it being said in that connection: 'The question to be determined in this case was not what credit and effect are given in an action against a stockholder in the courts of Rhode Island to a judgment in those courts against the corporation of which he is a stockholder, but what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered. Thus and thus only can the full faith and credit prescribed by the Constitution of the United States and the Act of Congress be secured' " (56 L. ed., at p. 755).

At this stage of our discussion, it is appropriate to set forth the fundamental difference between the effect which the "full faith and credit" clause of the United States Constitution and the related act of Congress secures to a foreign *judgment*, and the effect which they secure to a foreign *statute*. Sec. 1, Art. 4 of the United States Constitution provides as follows:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

In pursuance of said constitutional provision, Congress enacted a statute (Rev. Stat., Sec. 905) which provides as follows:

> "The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. *The records and judicial proceedings*

> *of the courts* of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. *And the said records and judicial proceedings,* so authenticated, *shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.*"

It is apparent at once that Congress has differentiated between "the acts of the legislature of any state" and "the records and judicial proceedings of the courts of any state" by providing *with reference to the latter only* that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States *as they have by law or usage in the courts of the State from which they are taken.*" It is by virtue of this specific provision with reference to the "records and judicial proceedings of the courts of any state" that it is held (as in the last mentioned case, *supra*) that where a *judgment* of one state has the effect of creating a cause of action in favor of one person against another *in that state,* that judgment must be given *the same effect* in all the other states. *Per contra,* it is by reason of the fact that Congress has *not,* under its constitutional authority, attached such an effect to "the acts of the legislature of any state," that there is no constitutional sanction for a holding that where the *statutes* of one State create a cause of action in favor of one person against another, the same effect must be given to that

statute in the courts of all the other States (as appellant would now have this court hold).

The foregoing interpolation is particularly pertinent to the remainder of the cases which appellant cites in connection with his contention under discussion (Brief, pp. 60 to 70, inclusive). Thus in the case of *Bernheimer* v. *Converse*, 206 U. S. 516, 51 L. ed. 1163, cited by appellant (Brief, pp. 60 *et seq.*), the stockholder's liability sought to be enforced rested upon the basis of a foreign *judgment*, like that in the case of *Hancock National Bank* v. *Farnum*, 176 U. S. 640, 44 L. ed. 619, *supra*.

In this case, to quote this court:

> "*An order of assessment* [made by the Court] of 36 per cent of the par value of each share of the capital stock of the thresher company, to wit, $18 per share, was assessed against each and every share of the capital stock, and against each and every person, corporation, or party liable as such stockholder, and each such person, corporation, or party was directed to pay to the said receiver, at his office in the city of Stillwater, Minnesota, within thirty days after the date of the order, the said sum of $18 a share; and, further, upon failure to pay said sums, the receiver was authorized [by the same court order] to prosecute actions or proceedings against the persons liable in any court having jurisdiction in the State of Minnesota or elsewhere. On appeal to the supreme court of the state of Minnesota *this order* was affirmed" (51 L. ed., at p. 1165).

On appeal to this court, *the only constitutional questions raised and passed upon* (*and they were raised by the defendant and not the plaintiff*) were (1) whether or not the obligation of the defendant's contract (as stockholder)

was enlarged and hence *impaired* unconstitutionally by a statute of Minnesota, enacted *after* the defendant became a stockholder, which provided a new means of enforcing his stockholder's liability; and (2) whether that statute by providing for judicial proceedings to be had without personal service of process upon stockholders and yet making the proceedings binding on the latter, violated the constitutional provision with reference to "due process of law." To note this court:

> "The principal contentions in these cases are that the act of 1899, above referred to, works such a change in the contract theretofore existing by virtue of the acquisition of stock in a Minnesota corporation as to impair the obligation thereof, and, in ways to be hereafter noticed, undertakes to hold a stockholder by judgment rendered without due process of law" (51 L. ed. at p. 1172).

Whatever other questions were involved in the case were *questions of general law*, and in deciding such questions this court was merely exercising its ordinary appellate jurisdiction in a suit brought in the federal courts, since that suit was one originally instituted not in a State court but in the United States District Court in New York. Thus it was by way of pronouncing upon a *matter of general law* that this court said what appellant quotes in part (Brief, pp. 60 and 61) viz:

> "It may be regarded as settled that, upon acquiring stock, the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature, and, as such, capable of being enforced in the courts not only of that state, but of another state and of the United States (Whitman *v.* National

> Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477), although the obligation is not entirely contractual, and springs primarily from the law creating the obligation (Christopher *v.* Norwell, 201 U. S. 216, 50 L. ed. 732, 26 Sup. Ct. Rep. 502" (51 L. ed. at p. 1174).

In other words, this court was merely recognizing here the *transitory nature* of the cause of action, as witness its citation of the case of *Whitman* v. *National Bank*, 176 U. S. 559, 44 L. ed. 587, which dealt only with such a question. Other excerpts from the opinion which are quoted by the appellant (Brief, pp. 61 to 63) relate wholly to the two above-mentioned constitutional questions *raised by the defendant*.

To the similar case of *Converse* v. *Aetna National Bank*, 212 U. S. 565, 53 L. ed. 654, cited by appellant (Brief, p. 63), the same comment applies as that above made on the case of *Bernheimer* v. *Converse*, 206 U. S. 516, 51 L. ed. 1163.

Appellant (Brief, pp. 63, *et seq.*) cites and quotes extensively from the case of *Converse* v. *Hamilton*, 224 U. S. 243, 56 L. ed. 749. That case was an action at law brought in the State Court of Wisconsin by a receiver of an insolvent Minnesota corporation to enforce an asserted double liability of two of its stockholders, resident in Wisconsin. In the receivership suit, the Minnesota court had adjudicated the insolvency of the company, the amount of its liabilities and the necessity of resorting to the double liability of its stockholders, and *had made an order* levying upon its stockholders an assessment of a sum equal to the full par value of their respective shares, and directed the receiver to institute suits to recover said assessments, *within and without the state*. The defendants had been notified of the application for the orders levying assessments, by

publication or mail, as the court directed. The Wisconsin court sustained a demurrer to the complaint on the ground that the receiver *had no right* (that is *authority*) *to sue in a foreign jurisdiction,* the court relying upon the case of *Finney* v. *Guy,* 189 U. S. 335, 47 L. ed. 839, to sustain its position. In other words, the Wisconsin court's decision denounced not the maintainability of the cause of action but the legal capacity-to-sue of the plaintiff (the receiver). Plaintiff appealed to the United States Supreme Court on the ground that the decision of the Wisconsin court violated the full faith and credit clause of the Constitution of the United States. At the outset, the Supreme Court considers the pertinent Minnesota statutes and decisions, and finds, among other things, that under the Minnesota law the *order* made by the Minnesota court levying the assessment was conclusive upon the defendants as stockholders "as to all matters relating to the amount of and the propriety of and necessity for the said assessment," and *that the Minnesota law expressly authorized the plaintiff as receiver to institute suits against stockholders to collect such assessment in any state or country,* and that under the Minnesota law, as interpreted by its courts, and the court's order levying the assessment, the receiver was

> "*invested* with the creditors' rights of action against the stockholders, and *with full authority* to enforce the same in any court of competent jurisdiction in the state or elsewhere" (56 L. ed., at p. 754).

This court then proceeds as follows:

> "This statement of the nature of the liability in question, of the laws of Minnesota bearing upon its enforcement, *and of the effect which judicial pro-*

ceedings under those laws have in that state, discloses, as we think, that in the cases now before us the supreme court of Wisconsin failed to give full faith and credit to those laws and *to the proceedings thereunder,* upon which the *receiver's right to sue was grounded.* It is true that an ordinary chancery receiver is a mere arm of the court appointing him, is invested with no estate in the property committed to his charge, and is clothed with no power to exercise his official duties in other jurisdictions. Booth *v.* Clark, 17 How. 322, 15 L. ed. 164; Hale *v.* Allinson, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; Great Western Min. & Mfg. Co. *v.* Harris, 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. Rep. 770. But here the receiver was not merely an ordinary chancery receiver, but much more. *By the proceedings in the sequestration suit,* had conformably to the laws of Minnesota, *he became a quasi assignee* and representative of the creditors, *was invested with their rights of action* against the stockholders, and *was charged with the enforcement of those rights* in the courts of that state *and elsewhere.* So, when he invoked the aid of the Wisconsin court, the case presented was, in substance, that of a trustee, clothed in adequate title for the occasion, seeking to enforce, for the benefit of his *cestuis que trustent* a right of action, transitory in character, against one who was liable contractually and severally, if at all. The receiver's right to maintain the actions in that court was denied in the belief that it turned upon a question of comity only, unaffected by the full faith and credit clause of the Constitution of the United States, and this view of it was regarded as sustained by the decision of this court in Finney *v.* Guy, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558. But that case is obviously distinguishable from those now before us." • • •

> "We perceive nothing in the decision in that case which makes for the conclusion that *when the representative character, title, and duties of a receiver have been established by proceedings in a Minnesota court* conformably to the altogether different provisions of the later statute embodied in chapter 272, his right to enforce in the courts of another State *the assessment judicially levied in Minnesota* depends upon comity, unaffected by the full faith and credit clause" (56 L. ed. at pp. 754-755).

From this language it is clear that the Supreme Court was dealing purely and specifically with the question of whether or not the plaintiff (receiver) was *"clothed with adequate title"* to enforce the stockholders' liability. That this was the precise question which the Supreme Court had in mind is conclusively attested by the fact that it refers to the decision of the Wisconsin court as having been rested *by that court* upon the decision of the United States Supreme Court in *Finney* v. *Guy*, 189 U. S. 335, 47 L. ed. 839, where the Supreme Court had affirmed the State court in holding that a receiver of an insolvent Minnesota corporation, under the then existing Minnesota law, *was not clothed with any right to sue outside of Minnesota* to enforce a liability of stockholders. This places beyond doubt that the Supreme Court was addressing itself solely to the question of whether or not the plaintiff as receiver was *invested with an authority or capacity* to enforce the stockholders' liability in the courts of other States, that is to say, whether the receiver was vested with title to the cause of action against the stockholders so that he would have *a standing* in the courts of other States to sue thereon. (At common law, of course, only the *owner* of a legal right or chose in action can sue thereon. *47 Corpus Juris, 22*). This question is to

be sharply distinguished from the altogether different question of whether or not, granted that a foreign receiver is by the laws of the foreign State invested with title to a cause of action against stockholders and with authority and capacity to prosecute that cause of action outside of his appointive State, other States *are bound to afford him a tribunal* in which he can exercise his admitted authority to sue upon the cause of action admittedly vested in him, a question which manifestly was not involved in the case under discussion. Indeed, in its decision of the case under discussion, the court was merely following its previous holding in the case of *Bernheimer* v. *Converse*, 206 U. S. 516, 51 L. ed. 1163, *supra*, where the court dealt with the objection *that the receiver could not bring the action.* What the court decided in that case is plainly indicated by the following language quoted from *that decision* by the Supreme Court in the case under discussion:

> "It *is objected that the receiver cannot bring this action*, and Booth *v.* Clark, 17 How. 322, 15 L. ed. 164; Hale *v.* Allison, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; and Great Western Min. & Mfg. Co. *v.* Harris, 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. Rep. 770, are cited and relied upon. But in each and all of these cases it was held that a chancery receiver, having no other authority than that which would arise from his appointment as such, could not maintain an action in another jurisdiction. In this case the statute *confers the right* upon the receiver, as a quasi assignee and representative of the creditors, and as such vested with the authority to maintain an action: *In such case we think the receiver may sue in a foreign jurisdiction* (56 L. ed., at p. 755).

This, of course, has nothing whatsoever to do with the question of whether or not one State is bound to permit a *cause of action* created by the laws of another State to be sued upon in its own courts, a question which manifestly goes *to the enforceability of the foreign cause of action* and *not* to the *legal authority or capacity* of any particular plaintiff *to institute suit thereon.* In the case at bar the question is whether or not a State may enact a law which prohibits its own courts from entertaining suit *upon a particular cause of action created by the laws of another State,* regardless of *who* brings the suit and regardless of the legal capacity or authority of the suitor to sue upon the prohibited cause of action. Section 94b of the New Jersey Corporation Act is plainly directed not against any particular suitor but against a particular cause of action.

But wholly independent of the foregoing considerations, the case under discussion (*Converse* v. *Hamilton*) is fundamentally *distinguishable* from the case at bar for three additional reasons: First, that case did not involve any conflict between the laws of Minnesota (on which the cause of action was based) and the laws of Wisconsin (where it was sought to be enforced); second, in that case *it was conceded that the Wisconsin Court "was possessed of jurisdiction" to entertain the suit;* and third, in that case the Supreme Court regarded and treated the plaintiff's cause of action as based not only upon the laws of Minnesota *but upon the "judicial proceedings"* in that State, and held that a denial of the plaintiff's right to sue in that case was a denial of full faith and credit to the *judicial proceedings* of Minnesota.

With respect to the first of these distinguishing features, it is to be noted that the Supreme Court itself gave it spe-

cial and explicit emphasis when it referred to the "well recognized exceptions" to the full faith and credit clause of the Constitution. Thus this court concedes that "the full faith and credit clause of the Constitution is not without well-recognized exceptions" (56 L. ed., at p. 755) and *in this immediate connection* the court plainly recognizes as one of such exceptions a case where plaintiff's suit *comes into conflict with the public policy of the State in which the suit is brought.* As to this the court says:

> "The subject to which chapter 272 [the Minnesota statute] is addressed is peculiarly within the regulatory power of the state of Minnesota; so much so that no other state properly can be said to have any *public policy* thereon. And what the law of *Wisconsin* may be respecting the relative rights and obligations of creditors and stockholders of corporations of its creation, and the mode and means of enforcing them, *is apart from the question under consideration*" (at p. 756).

In other words, the court is here observing that the case does not involve a clash between the foreign law and the public policy of the State of the forum inasmuch as the subject of the liability of stockholders of a *Minnesota corporation* and the method of enforcing same, *is a matter for Minnesota to legislate upon* and not *Wisconsin;* and hence the question of whether the *plaintiff (receiver)* was or was not *vested* with the cause of action against stockholders and the *legal capacity to prosecute same outside of Minnesota* was determinable only by the laws of Minnesota and could not possibly be *affected* by any questions as to the *public policy of Wisconsin.* Thus the court is plainly indicating that in that case there was no conflict between the Minnesota

law and the public policy or laws of Wisconsin. When regard is had to the fact that this observation occurs in the very course of the court's discussion of the *exceptions to the "full faith and credit" clause,* it can only be understood as the plainest recognition of the rule laid down in *Texas & Pacific Railroad Co.* v. *Cox,* 145 U. S. 593, 36 L. ed. 829, and the other cases cited *supra* that a person cannot compel the courts of one State to entertain a suit by him upon a cause of action created by the laws of another State where such law is in conflict with or contrary to the laws of the forum. In the case at bar, appellant's cause of action, based upon the New York Banking Law, is in direct and square conflict with the law of the State of New Jersey, whose plain and express terms forbid the maintenance of appellant's suit in the New Jersey courts of law.

With reference to the second of the abovementioned distinguishing features of the case under discussion, viz: that there was no question but that the Wisconsin court *"was possessed of jurisdiction" to entertain the suit,* it is to be noted that *this, too,* was emphatically mentioned by the Supreme Court in the course of its discussion of the *exceptions* to the "full faith and credit" clause. Thereby this court plainly implied and indicated that if any *want of jurisdiction* in the Wisconsin court had existed in that case, *that fact* would have taken the case out of the operation of the "full faith and credit" clause. In this connection, the court says:

> *"It is not questioned* that the Wisconsin court in which the receiver sought to enforce the causes of action with which he had become invested under the laws and proceedings relied upon *was possessed*

> *of jurisdiction which was fully adequate to the occasion.* His right to resort to that court was not denied by *reason of any jurisdictional impediment,* but because the Supreme Court of the State *was of the opinion* that, as to such causes of action, the courts of that State 'could, *if they chose,* close their doors and refuse to entertain the same' " (p. 756).

In other words, says the Supreme Court, the case is not one where the Wisconsin court had no jurisdiction to entertain the suit but merely one where the court thought it had *discretion to refuse to entertain the suit.* In the case at bar, the New Jersey Corporation Act (Section 94b) flatly denies jurisdiction to the New Jersey courts of law to entertain this suit.

The third of the abovementioned distinguishing features of the case in question is the fact that the Supreme Court regarded the plaintiff's cause of action as based not only upon the laws of Minnesota but *"upon the judicial proceedings"* of that State, and held that a denial of plaintiff's right to sue was a denial of full faith and credit to the *judicial proceedings* of Minnesota. This feature, alone, renders that case utterly inapplicable to the case at bar. For the full faith which is required by the Constitution to be accorded to a *foreign judgment* is fundamentally and totally different from that which applies to a *foreign statute* as we have already shown. That the Supreme Court, in the case under discussion, regarded that case as one involving a suit based not merely on a foreign statute but on foreign *"judicial proceedings"* is unequivocally asserted by the court itself in the following concluding paragraph of its decision:

> "In these circumstances, we think the conclusion is unavoidable that the laws of Minnesota *and the*

> *judicial proceedings in that state,* upon which the receiver's title, authority, and right to relief were grounded, *and by which the stockholders were bound,* were not accorded that faith and credit to which they were entitled under the Constitution and laws of the United States" (at p. 756).

If there were any doubt that the *ratio decidendi* of that case was that the state court had failed to give the constitutional full faith and credit to the "*judicial proceedings*" of another State, such doubt would be finally and completely resolved by the language of the Supreme Court in the later case of *Marin* v. *Augedahl,* 247 U. S. 142, 62 L. ed. 1038, wherein that case (Converse *v.* Hamilton), is cited and followed. The case of *Marin* v. *Augedahl, supra,* was, in most respects, similar to the *Converse* case, although the question of law raised was not precisely the same. In that case, the suit was brought in a North Dakota court by the receiver of an insolvent Minnesota corporation to enforce against a stockholder in North Dakota *an order of a Minnesota court* levying an assessment on the stockholders generally. The only defense set up was that the Minnesota court had no jurisdiction to make the said order because, defendant claimed, the corporation in question was not embraced within that class of corporations upon whose stockholders such liability was imposed by the Minnesota law. The United States Supreme Court held that the defendant was foreclosed and concluded from raising this question by the said *order* of the Minnesota court itself. In discussing that court order, the United States Supreme Court says:

> "The order with which we are here concerned was made by a Minnesota court in a sequestration

suit against a Minnesota corporation. Besides being a court of general jurisdiction, both at law and in equity, the court making the order had full jurisdiction of that suit. The suit was begun by a judgment creditor after an execution on his judgment was returned unsatisfied. The defendant corporation had its principal place of business in the county where the suit was begun, and was brought into the suit by due service of process. This much is not questioned. Nor is it questioned that a receiver was appointed, or that, by a petition in the suit, he sought an assessment on the stockholders, *or that public notice of the hearing on the petition was given as the court directed,* or that there was a *hearing* as contemplated" (at p. 1041). * * *

The order making the assessment is 'necessarily based upon a determination that the corporation is of the class whose stock is assessable, and not of the excepted class.' Whether the *decision* was right or wrong is not open to discussion here. If wrong it was subject to correction on proper application to the court which made it, or on appeal, but it was not void or open to collateral attack (at p. 1042). * * * By the law of its organization the *Minnesota court* was empowered to take cognizance of, hear and determine, the suit to sequestrate and the receiver's petition for an assessment. Thus it had jurisdiction of the subject matter. Cooper *v.* Reynolds, 10 Wall. 308, 316, 19 L. ed. 931, 932. The corporation was before it in virtue of process duly served, and the stockholders, as has been said, were *represented by the corporation.* Thus there was jurisdiction of the person.

Under these circumstances, *the order* is entitled, under the Constitution and laws of the United States, to the same faith and credit in the courts of North Dakota *as by law or usage are given to such order*

in the courts of Minnesota. Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 44 Law ed. 619, 20 Sup. Ct. Rep. 506; *Converse* v. *Hamilton,* 224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415, Ann. Cass. 1913D 1292'' (62 L. ed., at p. 1043).

This is a conclusive demonstration that in this case (*Marin* v. *Augedahl*), the United States Supreme Court considered and dealt with the *order of the Minnesota court,* levying an assessment upon stockholders, *as the thing that was entitled to ''full faith and credit''* under the Constitution, and by citing the case of *Converse* vs. *Hamilton* in that connection the court indicated its view that the similar *court order* involved in the *Converse* case, *was likewise regarded by the Supreme Court in that case.*

The case of *Marin* v. *Augedahl, supra,* is also relied upon by appellant (Brief, p. 67 *et seq.*) as authority for the proposition that Section 94b of the New Jersey Corporation Act is unconstitutional as denying full faith and credit to the New York Banking Law. In view of the fact hereinabove demonstrated that that case involved the application of the full faith and credit clause, not to the statute of another State but to the *judicial proceedings* of another State, it is scarcely necessary to add anything further to dispose of appellant's contention. Yet additional grounds of distinction are obvious. The case did not involve any opposition between the laws of the two states, as does the case at bar; nor was it a case, like the present one, in which the court of the forum lacks jurisdiction to entertain the suit by virtue of a statute which deprives it of such jurisdiction.

Appellant asserts (Brief, p. 69) that the foregoing cases in which there were foreign judgments adjudicating the

fact and amount of the stockholders' liability, are not to be distinguished from the case at bar by the fact that in this case there is no such foreign judgment. Appellant gives as his reason for this assertion that "if the extra-territorial force of the orders of theMinnesota court [in those cases] was predicated exclusively upon the application of the full faith and credit clause of the United States Constitution to *judgments*, the orders independent of the statutes upon which they were founded would have been invalid in jurisdictions other than Minnesota because of the absence of personal service in Minnesota upon the stockholders affected (*Pennoyer* v. *Neff*, 95 U. S. 714)" (Brief, p. 69). By this we suppose appellant means that if those judgments were considered in isolation and divorced from any cognizance of the related statutes under and in pursuance of which they were rendered, they might appear to have been defective because the non-resident stockholders had not been personally served in the suit; and that therefore the binding effect of such judgments upon the stockholders does not become apparent until account is taken of the related laws. True. But it does not follow from this that the meaning and effect of those decisions is to be arrived at *by ignoring the judgments themselves* and taking account only of *the related statutes only;* yet this is what appellant's argument seeks to do. Appellant overlooks the paramount fact that the very reason why those judgments were held entitled to be given the particular effect in other States which was there compelled, notwithstanding the want of personal service upon the non-resident stockholders, was because *such was the effect which the judgments had in the State in whose courts they were recovered, by virtue of the laws of that State;* and under the

provisions of the Constitution and the act of Congress, the courts of other States were bound to give such a *judgment the same effect as that which was given to it by the laws of the State wherein it was recovered.* The pertinent act of Congress provides as follows:

> "The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken" (Rev. Stat., Sec. 905).

Appellant, still referring to the abovementioned (Minnesota) cases, says "the order or decree of the Minnesota court was largely *administrative* in character" (Brief, p. 69). Without stopping to consider the accuracy or inaccuracy of that statement it is sufficient to say that the reason why *"the order or decree of the Minnesota court"* was required by this court to be given due effect in the courts of other states was because, and only because, of its *"judicial"* character, and the express provisions of the "full faith and credit" clause and the related act of Congress, which provides:

> "* * * The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, * * *. And *the said records and judicial proceedings,* so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken" (Rev. Stat., Sec. 905).

The cases in this court, such as *Kennedy* v. *Gibson,* 75 U. S. 476, and others, which appellant cites (Brief, p. 69), as recognizing the "administrative character" of such a decree or order, are all cases which *related to national banks* and were entirely governed by the *acts of Congress.* Obviously in such a case there could be no question as to the enforceability of a statute of one state by the courts of another state. The controlling law in such a case is the *federal law* relating to *national banks,* and, such law being the supreme law of the land, all states, of course, are bound to enforce it. The "full faith and credit" clause *obviously* is inapplicable and would not have to be invoked in such a case. For the same reason appellant's reference to the "quasi-judicial" character of an assessment by the *United States Comptroller of the Currency* against stockholders of a *national bank* is inapposite; and for the same reason appellant's effort to analogize an assessment by the Superintendent of Banks of the *State of New York* against stockholders of a *New York state bank* to an assessment by the United States Comptroller against stockholders in a *national bank* is utterly fallacious and is destitute of either logical or legal warrant.

POINT II.

The constitutionality of that provision of the New Jersey Statute in question which prohibits the bringing of a law action is not affected by any question as to the validity of that provision of the statute which permits the bringing of an equity action.

Appellant (Brief, p. 71) advances the proposition that

> "The requirement of Section 94b that the assessment may only be enforced through an accounting in an action initiated by a bill in equity denies to the determination by the New York Superintendent that conclusive effect which attaches to such determination under the laws of New York" (Brief, p. 71).

Under that proposition appellant presents arguments (Brief, pp. 71 to 74), most of which seem unrelated to his proposition. In addition to this, the argument is multifarious; and consequently we are compelled to take it up piecemeal.

Starting with the main proposition itself, we challenge the premise of fact upon which it rests, viz: that the determination of the New York Superintendent has a *conclusive* effect under the laws of New York. On the contrary, Section 80 of the New York Banking Law, after providing that

> "the superintendent shall have a cause of action, in his own name as superintendent of banks, against such stockholder either severally or jointly with other stockholders of such corporation, for the amount of such unpaid assessment or assessments" (Brief, p. 96),

goes on to provide that

> "In any such action, the written statement of the superintendent, under his hand and seal of office, reciting his determination to enforce the individual liability, or any part thereof, of such stockholders, and setting forth the value of the assets of such corporation and the liabilities thereof, as determined by him after examination and investigation, shall be *presumptive evidence* of such facts as therein stated" (Brief, p. 96).

In other words, the statute plainly recognizes and contemplates that in an action against the stockholder, the Superintendent will have to *prove* the value of the assets of the corporation, and the amount of its liabilities, in order to make out a case against the stockholder; and the above quoted provision merely facilitates such proof by him, by according to his written statement in that regard, the character of *presumptive* evidence. This provision of the New York statute investing the Superintendent's written statement with the character of "presumptive evidence" is one which, on elementary principles, is not binding upon and would not be recognized by the courts of other States. It is a mere rule of procedure. Obviously, the Legislature of one State cannot, by saying that a certain written statement shall be *prima facie* evidence of the truth of that which it asserts, impose upon the courts *of other States* an obligation to treat that written statement as even *competent evidence* in its own courts, let alone accord it the probative effect of *prima facie* proof. Plainly, such a *statement* is not merely hearsay, but is hearsay with reference to a matter as to which the writer, himself, (the Superintendent of Banks) even has no personal knowledge.

But even if the New York Superintendent's "determination" did have a *conclusive* effect under the laws of

New York, the courts of New Jersey would be under no constitutional obligation to give such "determination" the same conclusive effect in New Jersey; for that determination is not a judgment or "judicial proceeding" (United States Constitution, Art. 4, Sec. 1; Rev. Stat. Sec. 905). Nor is the Superintendent's "determination" a public act within the meaning of the full faith and credit clause of the Constitution, as appellant casually asserts (Brief, p. 74). The words "public act" as used in the full faith and credit clause of the United States Constitution mean *statute* and nothing else. This is established beyond question by the fact that Congress in carrying out the direction contained in Article 4, Section 1 of the United States Constitution (the "full faith and credit" clause) enacted that

> "The *acts of the legislature* of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. * * *"

By making no provision as to *any other "acts,"* Congress evinced its own understanding that *no other* "acts" were intended by the constitutional clause in question. Moreover, this court itself has spoken to the same effect in *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145, 76 L. ed. 1026, at page 1032.

Appellant complains (Brief, pp. 72 and 74) that Section 94b of the New Jersey statute in question "requires the Superintendent to institute an action in New Jersey in the nature of an equitable accounting * * * in order to recover the assessment made by him from New Jersey stockholders," and hence requires "judicial re-ascertainment" of the amount of the bank's liabilities and of the value of its

assets to establish the deficiency for which stockholders are to be held liable. From the standpoint of *constitutional requirements,* this complaint is wholly immaterial, since, as we have said above, the United States Constitution does not obligate the State of New Jersey to attach a conclusive effect to the New York Superintendent's "determination." Aside from its immateriality on this appeal, however, appellant's complaint is devoid of merit even on general legal principles. For as we have shown above, the New York Superintendent's determination, even under the New York law, is merely made "presumptive evidence" as to the amount of the liabilities and the value of the assets of the bank. In assigning a *prima facie* probative character to the Superintendent's determination (that is, "his written statement" thereof) the New York Banking Law merely enacted a *rule of procedure.* Being a mere *rule of procedure,* that feature of the New York law would not be binding on the courts of other states. Consequently even if the appellant were permitted by the New Jersey law to prosecute his action in a New Jersey *court of law* (as distinguished from a *court of equity*), it would still be necessary for the Superintendent to prove, by competent primary evidence, the value of all the assets of the bank and the amount of all its liabilities. In other words, appellant would be put to the same proof *in a court of law* in New Jersey as he would *in a court of equity* in New Jersey. Hence, appellant's complaint against the New Jersey statute on the score of its requiring him to bring *an equity action* in the nature of an accounting instead of an action at law is without substance. (We repeat, of course, that the foregoing discussion is academic on this appeal, since it does not relate to any *federal* question).

Appellant asserts (Brief, p. 72) that the cases of *Whitman* v. *National Bank of Oxford,* 176 U. S. 559, 44 L. ed. 587, and *Hancock* v. *Farnum,* 176 U. S. 640, 44 L. ed. 619, establish that the New Jersey statute in question violates not only the "full faith and credit" clause of the United States Constitution, but also the "due process" clause. As regards the "full faith and credit" clause, we have hereinbefore fully discussed those cases. As regards the "due process" clause, appellant says not a word as to why or how those cases warrant his indictment of the New Jersey statute on that score. An examination of those cases readily reveals them to be barren of such warrant. Appellant's further references (Brief, pp. 72 to 74) to the same cases and to other cases as authority for his contention that the New Jersey statute violates the full faith and credit clause of the United States Constitution calls for no further discussion by us, inasmuch as all of said cases have already been fully dealt with hereinabove. To answer appellant's various assertions in that portion of his brief now under discussion (Brief, pp. 72 and 73) would be mere repetition of previous portions of our own brief. We might note, however, one particular assertion of appellant, to wit, that the New Jersey statute in question would prohibit the institution of suits even in cases like that of *Bernheimer* v. *Converse,* 206 U. S. 516, 51 L. ed. 1163, *Marin* v. *Augedahl,* 247 U. S. 142, 62 L. ed. 1038, and other cases cited by appellant, where it was held that other states were bound to give full faith and credit to the "judicial proceedings" of the Minnesota courts involved in those cases. This assertion of appellant carries on its face its own refutation. As we have hereinabove shown, the *ratio decidendi* in those cases was that the courts of other states were required by the

United States Constitution to give due effect to the *judgment* of the Minnesota court, and that the giving due effect to the Minnesota judgment necessarily entailed and required enforcing the stockholders' liability therein and thereby adjudicated.

Appellant (Brief, p. 74) advances the proposition that:

> "The conditions imposed by Section 94b upon the enforcement of such assessment constitute a denial of the right of the Superintendent to resort to the Courts of the State of New Jersey to recover upon the assessment liability of stockholders of New York banks residing in New Jersey and thus violates the full faith and credit and due process clauses of the United States Constitution (Constitution, Art. IV, Sec. 1, XIVth Amendment).

Excepting the fact that this proposition makes reference to the "due process" clause of the United States Constitution, the proposition is virtually the exact equivalent of the proposition previously advanced (Brief, p. 71) as proposition "D" of appellant's Point I, which proposition we have already dealt with hereinabove. Appellant's argument under this particular proposition may be summarized thus:

The New Jersey statute in question which, on the one hand, prohibits an *action at law* in the New Jersey courts in such a case as this, on the other hand permits an action to be brought in its *equity courts*. But (appellant argues) the bringing of such an action in the New Jersey equity court is impracticable because it requires the joinder as defendants of more than 400,000 depositors and creditors and 20,000 stockholders (all of whom are non-residents of New Jersey), the doing of which (appellant claims) is

impracticable, legally impossible, and prohibitively expensive. It would be sufficient to dispose of this argument merely to say that it is utterly irrelevant to any *constitutional* question presented in this case. The question before this court is whether or not the United States Constitution compels a state to entertain a suit in its courts upon a cause of action based upon the statutes of another state. That question is wholly unaffected by the fact that the State, although refusing to entertain such a suit in its law courts, at the same time provides the suitor with another remedy which is or may be either impracticable or even legally defective. The question is whether that which the New Jersey statute *prohibits* is constitutional; not whether that which the New Jersey statute *permits* is legally valid or available. Obviously, therefore, appellant's attack upon the statute which is aimed *at that which it permits,* viz: its provision for a suit in equity is utterly beside the mark; and appellant's assertion that *that provision* of the statute is "unconstitutional" does not even need an answer. Of course, what counsel really means to say is that a non-resident who might be joined in such an equity suit, if one were brought, might have a right to claim that he would not be bound by any judgment entered therein by virtue of an absence of "due process of law." Obviously this purely hypothetical problem involving the rights of a third person (as a prospective defendant) is as remote as possible from any constitutional question in the case at bar.

If it were necessary to join issue with appellant's criticism of the *permissive* feature of the New Jersey statute, it would not be difficult to offer arguments in refutation thereof. In the first place, the criticism which appellant derives from the fact of the large number of the depositors

and stockholders of the New York bank, does not arise from any intrinsic fault in the New Jersey statute but from a mere circumstance connected with the New York bank itself. For example, if this suit were brought by the receiver of a comparatively small New York business corporation, to enforce a statutory liability against New Jersey stockholders of that corporation, and the total number of the corporation's stockholders and creditors was, let us say, no more than ten, the equity action which the New Jersey statute permits would not appear to be so impracticable or unreasonable as appellant says it is. Is this provision of the statute, then, to be condemned, not because of its own intrinsic nature but because of the peculiar situation which a particular case presents? In the next place, can it not be claimed with reason and justice that the real trouble in this case arises from the fact that the New York Legislature has seen fit to transfer the "determination" of the necessity for and extent of the enforcement of stockholders' liability from the courts of New York to the desk, so to speak, of the New York Superintendent of Banks? Indeed, the shortcomings of this method were implicitly recognized by the New York Legislature itself when in Section 80 of the New York Banking Law it provided that the "determination" of the New York Superintendent should be "*presumptive* evidence" and not *conclusive* evidence as to those matters in any action *brought in the courts of New York* to enforce such a stockholders' liability, thereby conceding the propriety of an ultimate *judicial* determination of those matters. Indeed, the absolute right of a stockholder to have a *court* pass upon these matters *in a judicial proceeding* was declared by the highest court of New York in the case of *Assets Realization Co.*

v. *Howard*, 211 N. Y. 430. In that case, that court, in dealing with a suit to enforce the stockholders' liability, says:

> "But whatever the technical nature of the liability may be, there can be no question that in its practical aspects and consequences it is of a secondary and exceptional character which is developed only by the unusual contingency that the corporation has become insolvent and unable to pay its debts. * * * Therefore, it comes about that unless in the action to charge him the stockholder may dispute and try the issue of indebtedness, he may very easily and probably be subjected to this onerous and unusual liability and compelled to pay an alleged debt which never existed and which has never been contested."

Although the suit in that case was instituted by a judgment creditor of the bank instead of the superintendent of banks, as here, the principle involved was identical, namely, the right of the stockholder to take issue on those facts whose existence are conditions precedent to the accrual and ascertainment of his liability.

POINT III.

Section 94b of the New Jersey Corporation Act and the judgment below do not deprive the creditors of the Bank of the United States of their property without due process of law.

Appellant (Brief, p. 80) makes the following statement:

> "Moreover, since the assessment obligation arises out of the free and voluntary contract entered into by stockholders residing in New Jersey, and is in

> the nature of an ordinary commercial obligation, it may not be destroyed through a denial of the right to pursue ordinary legal remedies in the courts of New Jersey without at the same time depriving the creditors of The Bank of United States of their property without due process of law."

Appellant offers no argument whatsoever in support of this bare assertion but merely names the following cases, apparently as his authority for making it viz.: "*N. Y. Insurance Co.* v. *Dodge*, 246 U. S. 357; *N. Y. Life Insurance Co.* v. *Head*, 234 U. S. 159; *Insurance Co.* v. *Dunken*, 266 U. S. 389; *Insurance Co.* v. *Dick*, 281 U. S. 397" (Brief, p. 80). None of these cases is apposite.

In each of said cases the *defendant* appealed to this Court from a judgment of a state court which, by applying the law of the forum to a contract made in another state and governed by the latter's laws, deprived *defendant* of a good *defense* which the foreign law gave him. Thus the holding in the first named case: *N. Y. Insurance Co.* v. *Dodge, supra*, was as follows:

> "Under the laws of New York, where the parties made the loan agreement now before us, it was valid; also it was one which the Missouri legislature could not destroy or prevent a citizen within its borders from making beyond them by direct inhibition; and applying the principles accepted and enforced in New York L. Ins. Co. *v.* Head, we think the necessary conclusion is that such a contract could not be indirectly brought into subjection to statutes of the state and rendered ineffective through a license authorizing the insurance company there to do business. As construed and applied by the Springfield court of appeals, Sec. 7897 transcends the power of the state. To hold otherwise would permit destruc-

> tion of the right—often of great value—freely to borrow money upon a policy from the issuing company at its home office, and would, moreover, sanction the impairment of that liberty of contract guaranteed to all by the 14th Amendment" (62 L. ed. at p. 783).

The holding in the second named case: *N. Y. Life Insurance Co.* v. *Head, supra,* is sufficiently indicated in the foregoing quoted excerpt wherein it is expressly referred to.

The holding in the third named case: *Insurance Co.* v. *Dunken, supra,* was as follows:

> "From these premises it necessarily results that the second policy follows the status of the first, for which it was exchanged, and is not subject to the Texas statute relating to penalties and attorneys' fees, but is controlled by Tennessee law. The judgment below, therefore, in so far as it gives effect to the Texas statute by imposing a penalty of 12 per cent and allowing attorneys' fees, is erroneous, in that the Texas statute cannot constitutionally be applied to a Tennessee contract" (69 L. ed. at p. 350).

In the fourth named case: *Insurance Co.* v. *Dick, supra,* the suit was brought in the court of Texas by a citizen of that state upon a contract entered into in Mexico and by an express provision of the contract it was made subject to the Mexican law. Notwithstanding this fact, the Texas court permitted plaintiff to recover a judgment in accordance with the provisions of the Texas laws. On appeal to this court, which reversed the judgment below, this court said:

> "Texas was, therefore, without power to affect the terms of contracts so made. Its attempt to im-

> pose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law" (74 L. ed. at p. 933).

It is plainly apparent that the foregoing cases furnish no support to appellant's aforesaid contention.

Appellant (Brief, p. 81) cites and quotes from several cases on the subject of "due process." The first of these cases is *Nebbia* v. *New York*, 291 U. S. 502. That was an appeal to this Court by defendant from a judgment of the County Court of Monroe County, State of New York, convicting him of violating an order of the state milk-control board fixing retail prices to be charged for milk by stores. This Court affirmed the judgment of the court below. Obviously that case has no bearing on any question presented by the appeal at bar. The next case is that of *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 67 L. ed. 341. The facts and the holding in that case, to quote from the opinion of this court, were as follows:

> "This case is here by writ of certiorari to the supreme court of Nebraska. The question is whether the taxing authorities of the state of Nebraska and of Dakota county, in assessing taxes against the petitioner, the Sioux City Bridge Company, upon that part of its bridge across the Missouri river at South Sioux City, which is in the jurisdiction of Nebraska, deprived the Bridge Company of due process of law, and denied it the equal protection of the laws, in violation of the 14th Amendment" (67 L. ed. at p. 341). • • •
>
> "The dilemma presented by a case where one or a few of a class of taxpayers are assessed at 100 per

> cent of the value of their property, in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage, in violation of the law, has been often dealt with by courts, and there has been a conflict of view as to what should be done. There is no doubt, however, of the view taken of such cases by the Federal courts in the enforcement of the uniformity clauses of state statutes and constitutions, and of the equal protection clause of the 14th Amendment. * * * This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute" (67 L. ed. at p. 343).

The next of these cases is *Chicago R. R. Co.* v. *City of Chicago,* 166 U. S. 226, 41 L. ed. 979. In that case, the plaintiff railroad company had been awarded a sum of One Dollar by a court of Illinois "for the taking, under the right of eminent domain, of a part of its right of way for the putting a public street across said right of way in the city of Chicago" (41 L. ed. at p. 980). The plaintiff railroad company appealed to this court on the ground that the said judgment deprived it of its property without due process of law. This court affirmed the judgment of the court below and concluded its opinion as follows:

> "We have examined all the questions of law arising on the record of which this court may take cognizance, and which, in our opinion, are of sufficient importance to require notice at our hands, and finding no error, the judgment is affirmed" (41 L. ed. at p. 992).

Obviously none of these cases has the slightest applicability to the case at bar.

It is self-evident that the refusal of a state to entertain a suit upon a cause of action based upon the statutes of another state cannot possibly be said to deprive the plaintiff of any property without due process of law, in violation of the Constitution of the United States. A refusal of a state to open the doors of its courts to a suitor does not take anything away from the plaintiff. Just the reverse; it merely refrains from giving something to him. The only case in which such a refusal could even arguably be said to take something from him would be a case where a contract upon which he relied had been entered into by him prior to the date on which the proscribing statute was enacted. Such is not the situation in the case at bar, for the New Jersey statute here in question was enacted in 1897, which was years before the Bank involved herein was organized (Record, pp. 15 and 20). Excepting the case where the plaintiff's contract antedated the opposing statute, it would seem impossible that such a statute could ever be said to have the effect of depriving *a plaintiff* of any property without due process of law. It is always a *defendant* who is thus aggrieved. This distinction between the legal situation of a *plaintiff* and the legal situation of a *defendant* in the case of a refusal of the courts of one state to enforce rights arising under the laws of another state, was expressly noted by this court in the case of *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 76 L. ed. 1026. In that case this Court said:

> "A state may, on occasion, *decline to enforce a foreign cause of action.* In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's

> substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive *defense* under the applicable law of another State, as under the circumstances here presented, *subjects the defendant* to irremediable *liability. This* may not be done" (76 L. ed. at p. 1036).

And be it noted that in support of this distinction, this Court cites, *inter alia,* one of the cases which appellant has hereinabove cited on the subject of "due process of law," viz.: *Insurance Co.* v. *Dunken,* 266 U. S. 389, 69 L. ed. 342, 45 S. Ct. 129.

POINT IV.

The New Jersey Statute in question and the judgment below do not operate in this case to violate the provision of the United States Constitution which entitles the citizens of each State to all the privileges of citizens in the several States (Art. IV, Sec. 2, Par. 1).

Appellant asserts (Brief, p. 80):

> "In depriving, through the imposition of impossible conditions, the New York Superintendent of Banks, and through him the creditors of The Bank of United States, of the right to sue in New Jersey, Section 94b as applied by the judgment below violates that provision of the United States Constitution which entitles the citizens of each state to all the privileges, including the right to sue, of the citizens in the several states."

This contention is clearly untenable. The New Jersey statute in question applies to all actions of the kind therein described *by whomsoever brought,* regardless of whether

or not the plaintiff is or is not a citizen of New Jersey. Indeed, the statute goes further in its impartiality and applies to actions against stockholders of any corporation, whether "domestic" or "foreign." Thus the statute provides:

> "*No action* or proceeding shall be maintained in any court of law of this state against any stockholder, officer or director of any domestic or foreign corporation * * *."

The language used by this court in the case of *Chambers* v. *Baltimore & O. R. Co.*, 207 U. S. 142, 52 L. ed. 143, is squarely applicable. In that case the court said:

> "She [the plaintiff] has not been denied access to the Ohio courts because she is not a citizen of that state, but because *the cause of action* which she presents is not cognizable in those courts. She would have been denied hearing of the same cause for the same reason if she had been a citizen of Ohio. In excluding her cause of action from the courts the law of Ohio has not been influenced by her citizenship, which is regarded as immaterial" (52 L. ed., at p. 147).

POINT V.

Appellant's Point II is immaterial on this appeal and does not present a Federal question.

Appellant (Brief, p. 82) advances the proposition that

> "Since Section 94b is unconstitutional, this action was properly instituted in the New Jersey Court of Law."

As to this, it is only necessary for us to say that the sole question before this court is whether or not Section 94b is unconstitutional, as appellant claims. If it is, the further question which appellant's proposition raises is academic, aside from the fact that it does not present a federal question.

POINT VI.

The judgment below is not invalidated on any constitutional ground because it is a final judgment and does not provide for a transfer of the cause to the Court of Chancery of New Jersey.

Appellant, (Brief, p. 83) advances the proposition that

> "In any event, since the judgment below is final and the action was not transferred to the Court of Chancery of New Jersey, it is invalid."

Obviously this proposition does not raise any constitutional or federal question and hence cannot properly be considered by this court. Nor does appellant himself claim that his proposition raises a constitutional or federal question; for nowhere in his argument under the proposition does he mention or even suggest any such question. What is more, however, appellant's alleged grievance in this particular regard is wholly without justification, for although appellant (Brief, p. 83) asserts that the court below

> "entered an order *over objections of counsel for plaintiff*, directing not that the action be transferred to the Court of Chancery or be dismissed with leave to institute suit in equity pursuant to Section 94b of the New Jersey Corporation Act, *but that judgment*

final be entered in favor of the defendants (R., p. 22),"

the transcript of the record in this case conclusively establishes that that situation is attributable entirely to appellant's own neglect or fault. In the opinion filed by Justice Parker in the New Jersey Supreme Court (Record, p. 15) the court concludes its opinion with the following language:

> "My conclusion is that the present complaint cannot be supported and must be struck out as stating causes of action which by statute are not maintainable at law in this State. Whether a judgment for the defendant should be directed thereon is a matter on which counsel are probably entitled to be heard.
>
> As I view the matter now, it would seem that there should be a judgment for the moving defendants subject of course to appeal, and without prejudice to the filing of a bill in equity on the lines laid down in Section 94b of the Corporation Act. The matter might be transferred to the Court of Chancery, but the complaint would have to be reframed, I think in any event.
>
> I will hear counsel on the first convenient motion day as to settlement of these details."

That opinion was filed on January 30th, 1934 (Record, p. 15). Ten days later the same Supreme Court Justice "on due notice to plaintiff" made the order striking out appellant's complaint (Record, p. 21), and that order contains, *inter alia*, the following language:

> "Ordered, that plaintiff's complaint be and the same hereby is struck out as to the above named defendants, and *it appearing that no application is made by plaintiff to amend said complaint*, it is further

> Ordered, that judgment final be entered in favor of each of said defendants and against said plaintiff, with costs to be taxed under the direction of this Court" (Record, p. 22).

These record facts are irreconcilable with appellant's assertion above quoted, unless, of course, that assertion is intended by appellant to mean merely that the striking out of the complaint was done "over objections of counsel for plaintiff" (Brief, p. 83), but not the omission which appellant now complains of. Moreover, the appellant, despite his own neglect, has not been irremediably prejudiced by the feature of the judgment which he complains of, for the remittitur entered in the New Jersey Court of Errors and Appeals is held up by the present appeal to this court and consequently the record and proceedings herein have not yet been remitted to the court below. Hence, if there should be a judgment of affirmance by this court, the New Jersey Court of Errors and Appeals will still have jurisdiction of the cause. *King* v. *Ruckman*, 22 N. J. Eq. 552. Appellant, therefore, would be in a position to apply to that court and obtain an amendment or modification of the remittitur so as to transfer the cause to the New Jersey Court of Chancery.

CONCLUSION.

We therefore respectfully submit that the judgment of the court below should be affirmed.

Respectfully submitted,

NATHAN BILDER,
WALTER J. BILDER,
Of counsel with Respondents Mary Rosner, Essie R. Stone, Camilla Lowy, *et al.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 528.

JOSEPH A. BRODERICK, SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK,

Appellant,

vs.

MARY ROSNER, ESSIE R. STONE, CAMILLA LOWRY, ET AL.,

Appellees.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May It Please the Court:

The undersigned, as counsel for Samuel H. Squire, superintendent of banks of the state of Ohio, respectfully moves this honorable court for leave to file the accompanying brief as *amicus curiae*.

JOHN W. BRICKER,
Attorney General of Ohio,
Counsel for Samuel H. Squire, Superintendent of Banks of Ohio, as *Amicus Curiae*.

Of Counsel:

W. DALE DUNIFON,
First Assistant Attorney General.

J. ROTH CRABBE,
Assistant Attorney General.

BRIEF OF JOHN W. BRICKER, ATTORNEY GENERAL OF OHIO, AS AMICUS CURIAE.

I.

PRELIMINARY STATEMENT.

There are now pending in the United States District Court, District of New Jersey, three suits instituted by the state of Ohio upon the relation of its superintendent of banks, seeking recovery of constitutional and statutory liability imposed upon residents and citizens of New Jersey, as owners of capital stock of certain Ohio banks now in the possession of the superintendent of banks of Ohio for liquidation. These cases are *State of Ohio ex rel. v. Anna H. McMaster*, Law No. 3648; *State of Ohio ex rel. v. Mame C. Holbrook, Law* No. 3649; *State of Ohio ex rel. v. Montclair Trust Co., etc.*, Law No. .....

The first two of these cases are pending upon motions to strike out the complaints, such motions being in the nature of demurrers. In support of these motions the respective defendants urge the application of Section 94b of the New Jersey Corporation Act (Ch. 50, p. 124, P. L. 1897), the validity of which is challenged by the appellant in this case. The third of the pending actions has recently been filed but it may reasonably be expected that a similar defense will be urged therein. The assessed liability sought to be recovered in the three cases exceeds $45,000.

The Security-Home Trust Co., Toledo, Ohio, and The Guardian Trust Co., Cleveland, Ohio, stockholders of which are defendants in the above litigation, as well as The Union Trust Co., Cleveland, Ohio, and The Standard Trust Bank, Cleveland, Ohio, are all in the possession of the superintendent of banks of Ohio for liquidation under Section 710-89, General Code.* The superintendent has levied an assessment against all of the stockholders of each of these banks, pursuant to Article XIII, Section 3, Ohio Constitution, and Sections 710-75 and 710-95, General Code of Ohio. A number of stockholders of each of these banks reside in the state of New Jersey.

Unless Section 94b of the New Jersey Corporation Act is declared invalid by this court, it is manifest that the superintendent of banks of Ohio is precluded from recovering upon such assessments by an action at law in the courts of New Jersey, although such assessments have been validly levied under the law of Ohio.

By the points made in our argument, we shall seek to establish the proposition that Section 94b of the New Jersey Corporation Act and the final judgment of the court below, based thereon, will result in denial of the full faith and credit required under Article IV, Section 1, of the Constitution of the United States, to Article XIII, Section 3, of the Constitution of Ohio, and Sections 710-75 and 710-95, General Code of Ohio, and to the public act of the superintendent of banks of Ohio, pursuant thereto, in levying an assessment against the stockholders of banks organized under the laws of Ohio now in his possession under Section 710-89, General Code of Ohio.

*All pertinent Ohio Constitutional and statutory provisions appear in the Appendix.

II.

ARGUMENT.

SUMMARY OF ARGUMENT.

Point A.

Under Article XIII, Section 3, of the Ohio Constitution, and Sections 710-75 and 710-95, General Code of Ohio, as interpreted by the Ohio courts, all stockholders of Ohio banks are subject to a constitutional and statutory double liability.

Point B.

Under Sections 710-75 and 710-95, General Code of Ohio, as construed by the courts of Ohio, the determination of the necessity for and the amount of stockholders' assessments by the superintendent of banks is an official or public act and cannot be controverted in an action brought to recover stockholders' liability.

Point C.

Under Article IV, Section 1, of the United States Constitution, New Jersey is required: (1) to permit enforcement against stockholders of Ohio banks residing in New Jersey of the liability provided under Article XIII, Section 3, Ohio Constitution, and Sections 710-75 and 710-95, General Code of Ohio; and (2) to recognize the official

determination by the Ohio superintendent of banks of the necessity for such assessment, made pursuant to Sections 710-75 and 710-95, General Code of Ohio.

Point D.

The requirement of Section 94b, New Jersey Corporation Act, that the assessment may only be enforced through an accounting in an action initiated by a bill in equity, denies to the determination by the Ohio superintendent of banks that conclusive effect which attaches to such determination under the laws of Ohio.

POINT A.

Under Article XIII, Section 3, of the Ohio Constitution, and Sections 710-75 and 710-95, General Code of Ohio, as Interpreted by the Ohio Courts, All Stockholders of Ohio Banks Are Subject to a Constitutional and Statutory Double Liability.

Since all sections of the Ohio Constitution and General Code applicable to the issues of this case are quoted in the Appendix hereto, reference will be made only to the pertinent portions thereof in the body of the brief.

The history of double liability of stockholders in Ohio dates back to the Constitution of 1851. In that Constitution there appeared what was known as Section 3 of Article XIII, the pertinent provisions of which are as follows:

> "Dues from corporations shall be secured by such individual liability of the stockholders, and other

means, as may be prescribed by law; but, in all cases, such stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock."

This constitutional provision affected stockholders of all corporations, including banks, and was in effect from 1851 to 1903 in the same form as originally enacted. In 1903 the provision for double liability on stock was repealed and from 1903 until January 1, 1913, there was no double liability on stockholders of any corporation, including banks.

Lang v. Osborn Bank, 100 O. S., 51, 125 N. E., 105.

In the year 1912 a Constitutional Convention was held in Ohio and as a result an amendment was adopted to the Constitution which became effective on January 1, 1913, being that part of Section 3, of Article XIII of the Constitution quoted below in italics. This section as amended has remained in its original form to the present time and reads as follows:

"Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her; *except that stockholders of corporations authorized to receive money on deposit shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares.* * * *" (Italics ours.)

Under the Ohio Constitution of 1851 and the laws passed thereunder, the Ohio courts held that stockholders were only secondarily liable. Under these decisions the creditors' right to pursue the stockholders accrued only when the remedies against the corporation were exhausted either by process or by the insolvency of the corporation. *Morgan v. Lewis,* 46 O. S., 1, 17 N. E., 558; *Barrick v. Gifford,* 47 O. S., 180, 24 N. E., 259; *Younglove v. Lime Co.,* 49 O. S., 663, 33 N. E., 234; *Bronson v. Schneider,* 49 O. S., 438, 33 N. E., 233.

The 1912 amendment of Article XIII, Section 3, Ohio Constitution, above quoted, was held to be self-executing by the Supreme Court of Ohio in the case of *Lang v. Osborn Bank, supra.* The constitutional provision has remained unchanged and the courts of Ohio have consistently held stockholders liable thereunder. *Lang v. Osborn Bank,* 100 O. S., 51, where it was held that such liability applies to all indebtedness of the corporation while such amendment is in effect; *Andrews v. State ex rel.,* 124 O. S., 348; *Snider v. The United Banking & Trust Co.,* 124 O. S., 375; *State ex rel. v. Weinberger,* 44 O. App., 264, 185 N. E., 432; *State ex rel. v. Cole,* 14 Ohio Law Abstract, 464 (not officially reported); *Feldman v. Standard Trust Bank,* 46 O. App., 67, 187 N. E., 743, motion to certify overruled by the Supreme Court, 127 O. S., 181; *Fulton v. Wetzel,* 47 O. App., 72, 190 N. E., 776, petition in error dismissed, 128 O. S., 109, petition in error (*Wetzel v. Fulton,* No. 62, October Term, 1934) dismissed, 55 S. Ct., 207, petition for rehearing denied, 55 S. Ct., 236; *Baumgardner v. State ex rel.,* 48 O. App.,

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Furthermore, under the decisions of the Ohio courts, such liability is not penal but is contractual in nature. In the cases of *Kulp v. Fleming*, 65 O. S., 321, and *Blair v. Newbegin*, 65 O. S., 425, the Supreme Court of Ohio had before it the question whether creditors of a Kansas corporation could use the Ohio courts to recover from stockholders residing in Ohio, liability imposed by Article XII, Section 2, of the Constitution of Kansas of 1859 and the General Statutes of Kansas of 1868, Chapter 23, Section 32, et seq. Recovery was permitted in each case. The court in *Kulp v. Fleming*, held, as disclosed by the first and fourth branches of the syllabus:*

> "1. A provision of statute that the stockholders of a corporation shall be individually liable to creditors for the debts of the company does not alone create the liability. It is rather a legislative requirement that whoever becomes a stockholder shall thereby assume an individual liability, and thus gives legal effect to the acts of the parties. The actual liability becomes operative by the act of a shareholder in becoming such, being founded on his proposal to become liable which arises from the membership and individual agreement to abide by the organic law of the corporation, and the acceptance thereof by the creditor by extending credit. Such obligation is contractual.

*Under Rule VI, Rules of Practice, Supreme Court of Ohio, the syllabus of the points of law decided is prepared by the judge writing the opinion and submitted to the judges concurring therein. The Court has held that the syllabus is an accurate and authoritative statement of the law laid down. *State ex rel v. Edmonston*, 89 O. S., 93; *Merrick v. Ditzler*, 91 O. S., 256; *Honhorst v. Honhorst*, 95 O. S. 408. The syllabus must, of course, be read in the light of the facts. *Williamson Heater Co. v. Radich*, 128 O. S., 124.

4. The individual liability of stockholders for debts of a corporation, provision for which is made by the constitution and statutes of Kansas, is not penal but is contractual. That liability may be enforced in Ohio. And a petition of a creditor in a suit against a stockholder which shows the constitutional and statutory provisions respecting such liability, and sets forth the construction given by the court of last resort of Kansas holding the liability to exist and to be several and contractual, and alleges other facts showing the ownership of the claim by plaintiff, the ownership of the stock by defendant, the insolvency of the corporation, its dissolution under the provisions of the statute and that it had suspended business more than a year before the commencement of the action, states a cause of action."

Furthermore, the cases under the National Banking Act are in point as to the nature of the liability created under Article XIII, Section 3, Constitution of Ohio, since, as pointed out by the court in *Baumgardner v. State, ex rel., supra,* at p. 16, that provision "is patterned after the National Banking Act, Section 5151 of the Revised Statutes of the United States, also known as Section 63 of Title XII, U. S. Code, the title on Banks and Banking." The court held that under the rule first stated in *Gale v. Priddy,* 66 O. S., 400, 64 N. E., 437, when statutes having a settled construction are adopted in this state, it is presumed that such construction is also adopted. The important decisions to the effect that the liability of a shareholder of a national bank is contractual are cited in the brief of appellant herein, at pages 16 and 17.

POINT B.

Under Sections 710-75 and 710-95, General Code of Ohio, as Construed by the Courts of Ohio, the Determination of the Necessity For and the Amount of Stockholders' Assessments by the Superintendent of Banks is an Official or Public Act and Cannot be Controverted in an Action Brought to Recover Stockholders' Liability.

After the 1912 amendment of Article XIII, Section 3, Constitution of Ohio, became effective, the General Assembly of Ohio enacted Sections 710-75, 710-89, 710-95 and 710-100, General Code of Ohio (108 Ohio Laws, Part 1, p. 80, *et seq.*). Section 710-89 authorizes the superintendent of banks to take possession of the business and property of a bank upon certain specified grounds, including insolvency. Section 710-100 authorizes any bank so taken over to enjoin further proceedings in liquidation if it deems itself aggrieved by such action of the superintendent of banks.

Section 710-75, General Code of Ohio, provides *inter alia:*

> "* * * At any time after taking possession of a bank for the purpose of liquidation when the superintendent of banks ascertains that the assets of such bank will be insufficient to pay its debts and liabilities he may enforce the individual liability of the stockholders."

Section 710-75, General Code of Ohio, which enumerates certain powers of the superintendent of banks, when in possession of a bank under Section 710-89, provides that he "*may, if necessary to pay the debts of such bank, enforce the individual liability of the stockholders.*"

The courts of Ohio have held that when the superintendent of banks is in possession of a bank for liquidation, he alone can proceed against the stockholders to recover their constitutional liability, unless he wrongfully fails or refuses to do his duty, in conformity with the statute. *Feldman v. Standard Trust Bank,* 46 O. App., 67, motion to certify overruled by the Supreme Court of Ohio, 127 O. S., 181; *Fulton v. Wetzel,* 47 O. App., 72, petition in error dismissed, 128 O. S., 109. A petition in error was filed in this court (*Wetzel v. Fulton,* No. 62, October Term, 1934), and dismissed, 55 S. Ct., 207, and petition for rehearing denied December 10, 1934, 55 S. Ct., 236; *State ex rel. v. Addams,* No. 399, 558, Court of Common Pleas, Cuyahoga county, decided July 9, 1934 (unreported).

The most recent comprehensive decision of the courts of Ohio on the law of stockholders' liability is the case of *Baumgardner v. State, ex rel.,* 48 O. App., 5, 192 N. E., 349, motion to certify overruled by the Supreme Court of Ohio, September 26, 1934, *sub nom Bender v. State, ex rel.,* No. 24861. This and the companion case of *State ex rel. v. Snyder,* 17 Ohio Law Abstract, 193, petition in error dismissed, 128 O. S., 546, were actions by the superintendent of banks to recover the unpaid liability assessed

by him against the stockholders of the Ohio Savings Bank and Trust Co., Toledo, Ohio, who reside in Ohio. In the *Baumgardner* case the court held in the first, second, third, fourth and ninth branches of the syllabus:*

"1. Stockholders' liability under Section 3, Article XIII of the Constitution, providing for the double or superadded liability of stockholders, is primary.

2. Under the provisions of Section 710-75, General Code, and cognate sections, the taking possession of the property and business of a bank by the superintendent of banks for the purpose of liquidation fixes the right of the superintendent to proceed with the liquidation, and as incidental to such liquidation, to ascertain whether the assets of the bank will be sufficient to pay its debts and liabilities, and to enforce the double liability of stockholders.

3. Neither the bank nor its stockholders can contest the authority or discretion of the superintendent of banks to proceed with the liquidation and to ascertain the necessity of enforcing double liability and determining the amount thereof other than by the exclusive remedy provided in Section 710-100, General Code.

4. When the superintendent has determined upon and made an assessment of 100 per centum of the liability, the proceeding must be at law.

* * * * * * * * * * * * * * *

9. A petition, alleging demand of payment from stockholders, together with the filing of suit for same, necessarily implies without further averment

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*Under Section 1483, General Code of Ohio, the syllabus is prepared by the judge of the Court of Appeals delivering the opinion. Rule 12, Rules of Practice of Courts of Appeals of Ohio, conforms to this statutory requirement. Under such provisions the syllabus states the law of the case (*Lebanon v. Schwartz*, 4 O. App., 173; *Flanery v. Cleveland, etc., R. Co.*, 26 Ohio C. C. (n. s.) 49, 28 C. D., 7) although it does not necessarily state all of the points decided *Lebanon v. Harvey*, 45 O. App., 215, 187 N. E., 28.

that the superintendent had decided upon data satisfactory to him that it was necessary to enforce the full amount of the liability, and consequently such a petition is not defective for failure to state a cause of action.

* * * * * * * * * * * * *"

In the course of the opinion the court said (48 O. App., pp. 22-24):

"The provisions of the state banking act with reference to the enforcement of the super-added liability of stockholders, are contained in Sections 710-75 and 710-95 of the General Code. The pertinent parts of said sections are as follows:

'Sec. 710-75. *Individual liability of stockholders.* Stockholders of banks shall be held individually responsible equally and ratably, and not one for another, for all contracts, debts and engagements of such bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. * * * *At any time after taking possession of a bank for the purpose of liquidation when the superintendent of banks ascertains that the assets of such bank will be insufficient to pay its debts and liabilities he may enforce the individual liability of the stockholders.*'

'Sec. 710-95. *Powers and duties after taking possession.* Upon taking possession of the property and business of such bank, the superintendent of banks is authorized to collect money due to such bank, and to do such other acts as are necessary to preserve its assets and business, and shall proceed to liquidate the affairs thereof, as hereinafter provided. * * * *and may, if necessary to pay the debts of such bank, enforce the individual liability of the stockholders.*'

It will be noted that the last clause of Section 710-95, G. C., is in practically the same language as the last clause of that part of Section 192, Title 12, of the United States Code, above quoted, and that the last sentence of Section 710-75 fixes the time for the enforcement of such liability.

The above quoted portion of Section 192 of the National Banking Act is in practically the same form as it was at the time of the decision in the case of Kennedy v. Gibson, 75 U. S., above mentioned, and in applying the said provisions of said section, it was held in that case that:

> 'It is for the comptroller of currency to decide when it is necessary to institute proceedings against the stockholders, to enforce their personal liability, and how much shall be collected.'
>
> 'His determination is conclusive, and the stockholders cannot question it in the litigation that may ensue.'

This holding was followed and applied in the federal cases and in the cases from other states hereinbefore referred to, as well as in many other federal and state cases.

In the opinion of the court in the case of Kennedy v. Gibson, supra, the following language is used:

> 'The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected.'
>
> 'These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may

ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of the suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved.'

Applying the rule of construction set forth in the case of Gale v. Priddy, 66 Ohio St., 400, supra; it is clear that by the amendment of the Constitution of 1912, above referred to, and the Banking Act providing for the procedural steps in enforcing the liability provided in the Constitution, power is conferred upon and delegated to the superintendent of banks at any time after taking possession of the bank for the purpose of liquidation, to ascertain upon such data as shall be satisfactory to him that the assets of such bank will be insufficient to pay its debts and liabilities, and upon such ascertainment being made, to enforce the individual liability of stockholders; and it is for him to decide upon such data as shall be satisfactory to him, when it is necessary to institute proceedings against the stockholders to enforce their personal liability and how much shall be collected, and his ascertainment and decisions are conclusive, and the stockholders cannot question them in the litigation that may ensue."

The case of *Kennedy v. Gibson*, 75 U. S., 476, 8 Wall., 498, is discussed in the brief for appellant herein at pages 21 and 22.

Further in the course of the opinion in the *Baumgardner* case, after quoting Section 710-100, General Code of Ohio, the court said at pages 26 and 27:

"While by this section the authority to bring such action is conferred on the bank, under the laws of

Ohio a stockholder would, in the event such bank refused to bring such proceeding upon demand by him, have the right to bring an action on behalf of the corporation under such section. So that any stockholder, under said section, where the superintendent of banks has taken possession of the property and business of the bank for the purpose of liquidation, has a complete and adequate remedy to enjoin further proceedings in liquidation, which necessarily includes the proceedings of the superintendent in ascertaining the necessity of and enforcing double liability and determining the amount thereof, in case the facts did not warrant and the superintendent of banks has been guilty of an abuse of discretion or fraud in taking possession of the property and business of the bank for the purpose of liquidation.

The remedy under this section is exclusive and when the superintendent of banks has taken possession of a bank for the purpose of liquidation, neither the bank nor its stockholders can otherwise contest the authority or discretion of the superintendent of banks to proceed with the liquidation and as incidental thereto, to ascretain the necessity of enforcing double liability and determining the amount thereof."

In determining the precise issue before it, the court upheld the rulings of the trial court in rejecting evidence offered on behalf of the stockholders, tending to show that the assets of the bank at the time the assessment was made were sufficient to pay its liabilities.

Under the law of Ohio, as well as under the New York Banking Law, and the National Banking Act, the delegation to an administrative officer of the power to determine the necessity for an assessment is not a delegation

of judicial power. In the case of *Baumgardner v. State, ex rel., supra,* the court said (48 O. App., at pp. 24-25):

> "It is held in the case of Bushnell v. Leland, 164 U. S., 684, decided January 4, 1897, that:
>
> 'Revised Statutes, Sections 5151 and 5234, empowering the comptroller to appoint receivers for insolvent national banks, and to make ratable assessments upon the stockholders, does not vest in him a judicial power in violation of the Constitution.'
>
> The provisions of the Constitution of this state, and the Constitution of the United States, with reference to the vesting and exercise of judicial power, are similar, and the holding of the Supreme Court that the power conferred on the comptroller to make ratable assessments on the stockholders, does not vest in him a judicial power in violation of the Federal Constitution, is by analogy applicable to the power vested in the superintendent of banks under the provisions of the Ohio Constitution and Banking Act.
>
> Furthermore, as the business of banking under the Constitution and laws of Ohio is of a quasi public character (124 Ohio St., 375, at 380), the determination and orders of the superintendent of banks as an official of the state under the supervisory and regulatory power over corporations reserved in the state and to its officers under Section 2 of Article XIII of the Constitution, are of an executive rather than a judicial character and do not come within the inhibition of the Constitution."

Section 2, Article XIII, Constitution of Ohio, appears in the Appendix hereto. The case of *Bushnell v. Leland,* 164 U. S., 684, is discussed in the brief for appellant, at pp. 35, 36.

In summary it appears under the law of Ohio with relation to the liability of stockholders of Ohio banks (1) that the liability created by Article XIII, Section 3, Constitution of Ohio, is not penal but contractual in nature; (2) that the superintendent of banks of Ohio, when in possession of a bank for liquidation, has the exclusive right to determine the necessity for and amount of stockholders' liability, and upon failure of the stockholders to respond to such assessment, after proper notice and demand, to bring action for its enforcement; (3) that the superintendent's determination of the necessity for and amount of an assessment is binding upon the stockholders in an action brought by him for the recovery of the assessed liability; and (4) that the delegation to the Ohio superintendent of banks of the power to levy assessments is valid. In each of these respects the law of Ohio is substantially the same as the law of New York.

POINT C.

Under Article IV, Section 1, of the United States Constitution, New Jersey is Required: (1) to Permit Enforcement Against Stockholders of Ohio Banks Residing in New Jersey of the Liability Provided Under Article XIII, Section 3, Ohio Constitution, and Sections 710-75 and 710-95, General Code of Ohio; and (2) to Recognize the Official Determination by the Ohio Superintendent of Banks of the Necessity for Such Assessment, Made Pursuant to Sections 710-75 and 710-95, General Code of Ohio.

Under the authorities so convincingly arrayed in the brief for appellant (pp. 38 to 70), it is clear that the measure of full faith and credit which, under Article IV, Section 1, each state is required to give "to the public acts, records and judicial proceedings of every other state", must be determined by the statutes and decisions of the courts of such other state. By reference to the Ohio law, it is apparent that New Jersey must permit enforcement of the contractual liability imposed upon the stockholders of Ohio banking corporations who reside in New Jersey. In a like manner it is equally clear that New Jersey must recognize the official determination by the superintendent of banks of Ohio as to the necessity for and amount of the assessment.

Upon principles of comity, Ohio lends its courts to aid sister states in enforcing liability which they impose

upon the stockholders of their own corporations. *Kulp v. Fleming*, 65 O. S., 321; *Blair v. Newbegin*, 65 O. S., 425. Nor has the superintendent of banks of Ohio, in charge of the liquidation of numerous Ohio banks, found the courts of any state, except New Jersey, closed to him in recovering liability assessed against stockholders of such banks residing in other states. The principles of comity involved are discussed in the brief for appellant at page 39, *et seq.*

Under Section 94b, New Jersey Corporation Act, and the decision of the courts below in the instant case, it is clear that New Jersey public policy precludes application of any such broad principles of comity. Thereby New Jersey would nullify the laws of New York, Ohio and numerous other states. To show that the constitutional and statutory provisions of New York and Ohio are by no means unique, we refer to the following decisions construing similar provisions of law existing in other states: *State Bank of Portland v. Gotshall*, 121 Ore., 92; *Thompson v. State, ex rel.*, 119 Okla., 166, 248 P., 1110; *Aber v. Maxwell*, 140 Ark., 203, 215 S. W., 389; *Houston Nat. Ex. Bank v. Chapman*, 263 S. W., 929 (Tex. Civ. App.); *Commissioner of Banks v. McKnight*, 281 Mass., 467, 183 N. E., 720; *Tunnicliffe v. Noyes*, 101 Fla., 794, 135 S., 505. All of the provisions construed in these cases follow closely the National Banking Act.

Since New Jersey refuses to apply the doctrine of comity to protect the depositors of New York, Ohio, and other state banks, these states must resort to the full faith and credit clause of the United States Constitution. We contend that this protection is ample and respectfully refer the court to the authorities discussed in the brief for appellant at pp. 39 to 70.

POINT D.

The Requirement of Section 94b, New Jersey Corporation Act, that the Assessment May Only be Enforced Through an Accounting in an Action Initiated by a Bill in Equity, Denies to the Determination by the Ohio Superintendent of Banks that Conclusive Effect Which Attaches to Such Determination Under the Laws of Ohio.

Under Section 94b, stockholders' liability created by the law of a sister state can be enforced in the courts of New Jersey only by an action "in a nature of an equitable accounting * * * to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties."

Keeping in mind the nature of the liability imposed upon stockholders of banks by the law of Ohio and the power of the superintendent of banks of Ohio in enforcing that liability, it is inescapable that Section 94b results in denial of full faith and credit to the laws of Ohio and to the public act of its superintendent of banks in levying an assessment against the stockholders of an Ohio bank. Section 94b would substitute the judgment of the New Jersey Chancery Court for that of the superintendent of banks in the matter of ascertaining the necessity for and the amount of the assessment.

As a practical matter the remedy offered by New Jersey is not available to the superintendent of banks of

Ohio. Under Section 94b, all creditors and stockholders of the corporation are necessary parties to the equitable action for an accounting. The superintendent of banks of Ohio, in charge of the liquidation of The Standard Trust Bank, Cleveland, Ohio, has levied a 100% assessment against all of its stock. The owners of this stock reside in 47 states of the Union and several foreign countries. A score of them reside in New Jersey. The creditors, likewise, are scattered throughout the United States. Manifestly, it is impossible for the superintendent to successfully prosecute an action in New Jersey requiring all stockholders and creditors to be made parties, in order to recover the liability slightly in excess of $3,000.00 owed by residents of that state. Although the stockholders and creditors are less widely scattered, a similar situation exists in the case of The Guardian Trust Co., Cleveland, Ohio, The Union Trust Co., Cleveland, Ohio, and The Security-Home Trust Co., Toledo, Ohio.

We urge that Section 94b is violative not only of the full faith and credit clause but of the due process clause of the Fourteenth Amendment. *Whitman v. National Bank of Oxford*, 176 U. S., 559; *Hancock v. Farnum*, 176 U. S., 640.

III.

CONCLUSION.

Urging, as we do, that Section 94b, New Jersey Corporation Act, is unconstitutional, we submit that the judgment below should be reversed and the action remanded to the New Jersey courts for further proceedings in accordance with the provision of the Constitution of the United States.

Respectfully submitted,

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APPENDIX.

Article XIII, Section 2, Ohio Constitution.

Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. Corporations may be classified and there may be conferred upon proper boards, commissions or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law. Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual.

Article XIII, Section 3, Ohio Constitution.

Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her; except that stockholders of corporations authorized to receive money on deposit shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such

shares. No corporation not organized under the laws of this state, or of the United States, or person, partnership or association shall use the word "bank", "banker" or "banking", or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation as may hereafter be provided by the laws of this state.

Section 710-75, General Code of Ohio.

Stockholders of banks shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. The stockholders in any bank who shall have transferred their shares or registered the transfer thereof within sixty days next before the failure of such bank to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way recourse which such stockholders might otherwise have against those in whose names such shares are registered at the time of such failure. In determining the said period of sixty days, the period or periods when any bank is in the possession of the superintendent of banks or is

operating under any restriction upon the withdrawal of deposits or the payment of liabilities shall be excluded. At any time after taking possession of a bank for the purpose of liquidation when the superintendent of banks ascertains that the assets of such bank will be insufficient to pay its debts and liabilities he may enforce the individual liability of the stockholders.

Section 710-89, General Code of Ohio.

The superintendent of banks may forthwith take possession of the business and property of any bank to which this act is applicable, whenever it shall appear that such bank:

1. Has violated its charter or any law applicable thereto;
2. Is conducting its business in an unauthorized or unsafe manner;
3. Is in an unsound or unsafe condition to transact its business;
4. Has an impairment of its capital for a period of ninety days;
5. Has refused to pay its depositors in accordance with the terms on which such deposits were received;
6. Has become insolvent;
7. Has neglected or refused to comply with the terms of a duly issued order of the superintendent of banks;
8. Has refused, upon proper demand, to submit its records and affairs for inspection to an examiner of the banking department; or

9. Its officers have refused to be examined upon oath regarding its affairs.

If, by resolution of the board of directors of any bank, such bank requests such action and gives notice of the adoption thereof to the superintendent of banks in person, by telephone, telegraph or mail, the superintendent shall, as soon thereafter as may be practicable, take possession of the business and property of such bank.

Section 710-95, General Code of Ohio.

The superintendent of banks, upon taking possession of the business and property of any bank, shall have, exercise and discharge the following powers, authority and duties, without notice or approval of court, but subject to the provisions of this chapter, to wit:

1. To collect all money due to such bank.

2. To perform all such acts as are desirable or expedient in his discretion to preserve and conserve the assets and property thereof.

3. To exercise all the rights and powers of such bank under or by virtue of any mortgage, collateral, note, contract, judgment, decree or other instrument.

4. To sell for cash any asset or assets of such bank at not less than the face or par value thereof, or the actual amount owing thereon, and to settle, compromise or compound any debt owing to or held by such bank, or any claim enforceable by the superintendent of banks, when such bank has a common interest with ten or more persons or corporations in any claims, securities or property,

by becoming a party to an agreement between and among the parties interested; and to confer control of such property upon a committee.

5. To pay off and discharge any taxes, assessments, liens, claims or charges against the assets or property of such bank.

6. To pay out and expend such sums as he shall deem necessary for the preservation, maintenance, conservation and protection of any such property or any assets or property on which such bank has a lien by mortgage, pledge or otherwise.

7. To institute and maintain against the directors, officers or employes of such bank, or any of them, any suit or action which such bank, its shareholders or creditors might institute and maintain.

8. To take title in his name or in the name of a nominee to any asset, including shares and certificates for shares of stock of any corporation, and to exercise all voting power and otherwise of an unqualified owner; but the transfer or sale of any such asset shall be subject to the applicable provisions of this section.

9. If he ascertains that the assets of such bank will be insufficient to pay its debts and liabilities, to enforce the individual liability of each shareholder thereof as provided in Section 710-75 of the General Code. Until an order to declare and pay a final dividend shall be entered in the liquidation proceedings the right to enforce such liability is hereby vested exclusively in the superintendent of banks.

10. For the purpose of executing and performing any

of the powers and duties hereby conferred upon him, in his name as superintendent of banks in charge of the liquidation of such bank, to institute, prosecute and defend any and all actions or proceedings within or without this state, and to execute, acknowledge and deliver any and all deeds, leases, assignments, releases, contracts and other instruments necessary or proper. Any deed or other instrument executed pursuant to the authority hereby given shall be as valid and effectual for all purposes as if the same had been executed by the officers of such bank by the authority of its board of directors. If any real estate so conveyed is situated outside of the county in which the proceedings for the liquidation of such bank are pending, a certified copy of the order of the court approving or ratifying the sale or conveyance thereof shall be filed in the office of the recorder of the county within which such property is situated.

Without prejudice to or limitation of the foregoing powers, authority and duties, the superintendent of banks may, upon application to the Court of Common Pleas in which the proceedings for the liquidation of such bank are pending, or a judge thereof, and on such terms as such court, or such judge, may by order approve;

1. Sell or compromise any or all bad or doubtful assets and debts owing to such bank; compromise claims against such bank and sell, lease, exchange or otherwise dispose of any real estate or personal property, or both; of such bank, in whole or in part.

2. Sell or exchange assets of such bank, the consideration for which sale or exchange may be, in whole or in

part, claims against such bank; provided, however, no such sale or exchange of any such assets, shall be made at less than the appraised value thereof, as fixed by appraisers appointed as provided in Section 710-95b of the General Code.

3. Surrender or abandon any asset, which he considers of no advantage to creditors, including choses in action, whether the subject of pending litigation or not, and reject or disclaim any lease or contract which he considers burdensome.

4. Transfer and sell for less than the par or face value, shares of stock of any corporation the title to which is in his name or the name of such bank.

5. Enter into a contract or contracts appointing any state or national bank, a liquidating agent or agents or otherwise providing for the liquidation thereby of any asset or assets of such bank, upon the terms, conditions and considerations expressed in said contract or contracts.

In case of doubt or difficulty, the superintendent may ask the instructions of such court, or a judge thereof, as to the manner in which he should exercise his powers and discretion. He shall not be directed or restrained in the exercise of his powers or discretion otherwise than in a suit in equity in which it shall be alleged and proved that he has exceeded or abused such powers and discretion.

The superintendent of banks shall give notice of the hearing of each application made pursuant to this section

by publication in a newspaper of general circulation in the county in which the proceedings for the liquidation of such bank are pending. Each such notice shall be published once and shall set forth the time when such application shall be heard, which shall be not less than ten days after the publication thereof, provided, however, that such court, or a judge thereof, may by order dispense with such publication of notice and hear any such application at any time before the expiration of said ten day period. At the hearing on any such application, any shareholder, depositor or creditor of such bank shall have the right to appear and be heard.

No order of the Common Pleas Court or judge thereof entered pursuant to this section shall be deemed a final order; but by leave of court an independent suit may be brought not later than five days after such order is entered by any such person deeming himself aggrieved thereby, to restrain any action thereby authorized.

Section 710-100, General Code of Ohio.

Whenever any such bank of whose property and business the superintendent of banks has taken possession, as aforesaid, deems itself aggrieved thereby, it may at any time within thirty days after taking such possession apply to the Common Pleas Court of the county in which the office of such bank was located, to enjoin further proceedings in liquidation, and said court, after citing the superintendent of banks to show cause why further proceedings should not be enjoined and hearing the allega-

tions and proofs of the parties and determining the facts, may dismiss such application or enjoin the superintendent of banks from further proceedings, and direct him to surrender such business and property to such person, partnership, corporation, company, society or association.

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SUPREME COURT OF THE UNITED STATES.

No. 528.—October Term, 1934.

Joseph A. Broderick, Superintendent of Banks of New York, Appellant,
vs.
Mary Rosner, et al.

On Appeal from the Court of Errors and Appeals of New Jersey.

[April 1, 1935.]

Mr. Justice Brandeis delivered the opinion of the Court.

Pursuant to Article VIII, Section 7, of the Constitution of New York, its Banking Law (Consolidated Laws, Chapter Two) provides, Section 120:

"The stockholders of every bank will be individually responsible, equally and ratably and not one for another, for all contracts, debts and engagements of the bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

The Bank of the United States is a corporation organized under the Banking Law of New York and had its places of business in New York City. Its outstanding capital stock is $25,250,000 represented by 1,010,000 shares of $25 par value. On November 17, 1933, Joseph A. Broderick, as Superintendent of Banks of the State of New York, brought, in the Supreme Court of New Jersey, this action against 557 of its stockholders who are residents of New Jersey, to recover unpaid assessments levied by him upon them pursuant to law.

The defendant moved to strike out the complaint on the ground, among others, that, by reason of Section 94 (b) of the Corporation Act of New Jersey (2 Comp. Stats. p. 1656), it failed to set out a cause of action enforceable in any court of that State. The section, first enacted March 30, 1897, provides:

"No action or proceeding shall be maintained in any court of law in this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal

liability be deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country, and no pending or future action or proceeding to enforce such statutory personal liability shall be maintained in any court of this state other than in the nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties."

Broderick seasonably claimed that to sustain the asserted bar of the statute would violate Article IV, Section I, of the Federal Constitution, which provides that: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State"; and the legislation of Congress enacted pursuant thereto. The trial court sustained the motion to strike out the complaint, *Broderick* v. *Abrams*, 112 N. J. L. 309, on the ground that the statute of the State constituted a bar to the action. Judgment against the plaintiff with costs, was entered in favor of each of the defendants, and the judgment was affirmed by the Court of Errors and Appeals "for the reasons expressed in the opinion" of the trial court. An appeal to this Court was allowed. 293 U. S. —.

First. The conditions imposed by Section 94 (b) of the New Jersey statute upon the bringing of suits to enforce such assessments, as here applied, deny to the Superintendent the right to resort to the courts of the State to enforce the assessment of liability upon the stockholders there resident. The requirement that the proceeding be by bill in equity, instead of by an action at law, would, if standing alone, be no obstacle. But by withholding jurisdiction unless the proceeding be a suit for an equitable accounting to which the "corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties", it imposes a condition which, as here applied, is legally impossible of fulfillment. For it is not denied that according to the decisions of the New Jersey courts "necessary parties" means those whose presence in a suit is essential as a jurisdictional prerequisite to the entry of judgment, so that no decree can be made respecting the subject matter of litigation until they are before the court, *Wilkinson* v. *Dodd*, 40 N. J. Eq. 123, 130; *In re Martin*, 86 N. J. Eq. 265; *McBride* v. *Garland*, 89 N. J. Eq. 314; and that to

secure jurisdiction personally over those who are not residents of New Jersey, or engaged in business there, is impossible. *Pennoyer* v. *Neff*, 95 U. S. 714; *Wilson* v. *American Palace Car Co.*, 65 N. J. Eq. 730; *Papp* v. *Metropolitan Life Insurance Co.*, 113 N. J. Eq. 522, 530. The corporation has no place of business in New Jersey; only a few of the many stockholders and creditors have either residence or place of business there.

Moreover, even if it were legally possible to satisfy the statutory condition by making substituted service by publication upon non-resident stockholders and creditors, compare *Kirkpatrick* v. *Post*, 53 N. J. Eq. 591, 594; *Id.* at 641, the cost would be prohibitive. The number of the stockholders is 20,843; the number of depositors and other creditors exceeds 400,000; and the amounts assessed against the individual defendants are relatively small—against some only $50. The aggregate of sheriff's fees alone as to the non-resident defendants, aside from expenses of publication and mailing, would exceed the aggregate amount due from the New Jersey stockholders.[1] The suggestion, in the opinion of the Supreme Court, that leave might be granted to file a bill in equity is, therefore, without legal significance.

Second. But for the statute, the action would have been entertained. Compare *Young* v. *Masci*, 289 U. S. 253. New Jersey has provided courts with jurisdiction of suits of like nature and procedure otherwise appropriate for their determination. *McDermott* v. *Woodhouse*, 87 N. J. Eq. 615, 620; *Graham* v. *Fleissner*, 107 N. J. Law 278; *Western Nat. Bank* v. *Reckless*, 96 Fed. 70. Compare *Cochrane* v. *Morris*, 10 N. J. Mis. R. 82. The plaintiff is not, as in *Booth* v. *Clark*, 17 How. 322, a foreign receiver. He sues as

[1]It is stated by counsel, without contradiction, that, under the New Jersey practice, before substituted service can ever be made, the sheriff must have made as to each non-resident defendant a return *non est inventus*. New Jersey Public Laws, 1922, ch. 88, entitles the sheriff to a fee of $1.50 for making an affidavit of non-residence as to each defendant. After such affidavit the plaintiff, it is said, would be required to make applications for leave to effect substituted service on each of the absent defendants and to present the essential facts showing the necessity therefor, setting forth the residence and place of business of each. Besides notice sent to each, it would be necessary to publish the notice once a week during four consecutive weeks in some newspaper. N. J. P. L. 1912, c. 155, § 13; N. J. Chancery Rules, 36-38. It is estimated that the 420,000 names of non-resident defendants would fill at least 80 newspaper pages of 8 columns each.

an independent executive in whom has been vested by statute the cause of action sued on, *Converse* v. *Hamilton*, 224 U. S. 243, 257. The complaint is in conformity to the state practice, see 112 N. J. Law 309, 310; *Beatty* v. *Lincoln Bus Co.*, 11 N. J. Mis. R. 938; and it sets forth the facts essential to a recovery against the stockholder under the law of New York. It shows that the requirements of a valid assessment and of the right to enforce the same by action at law have been complied with, alleging, among other things: that, on December 11, 1930, Broderick pursuant to Section 57 of the New York Banking Law, took possession of the Bank's business and property; that since May 6, 1931, he has been engaged in liquidating the same; that prior to July 1, 1932, he determined, pursuant to Sections 80 and 120, that the reasonable value of the assets of the Bank was not sufficient to pay the creditors in full and that there was due them $30,000,000 in excess of such reasonable value; that the deficiency then fixed and determined has continued ever since; that upon the Superintendent of Banks is imposed the duty of making assessment upon the stockholders and enforcing the liability of stockholders for the benefit of the creditors and that actions to enforce the liability are to be brought in the name of the Superintendent;[2] that prior to July 1, 1932, he determined that an assessment of $25 against each stockholder for each share of stock held by him was required for the payment of the Bank's indebtedness; that he duly made upon each stockholder a demand for the payment thereof on August 8, 1932; and that among the stockholders upon whom such demand was made and who failed to pay are the several defendants.

Third. The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard therein is subject to the limitations imposed by the Federal Constitution. *McKnett* v. *St. Louis-San Francisco Ry.*, 292 U. S. 230, 233. A "State cannot escape its constitutional obligations [under the full faith and credit clause] by the simple

[2]Section 80 of the New York Banking Law provides: "In case any such stockholder shall fail or neglect to pay such assessment within the time fixed in said notice, the superintendent shall have a cause of action, in his own name as superintendent of banks, against such stockholder either severally or jointly with other stockholders of such corporation, for the amount of such unpaid assessment or assessments, together with interest thereon from the date when such assessment was, by the terms of said notice, due and payable."

device of denying jurisdiction in such cases to courts otherwise competent." *Kenney* v. *Supreme Lodge*, 252 U. S. 411, 415.[a] It is true that a State can legislate only with reference to its own jurisdiction, *Bonaparte* v. *Tax Court*, 104 U. S. 592; *Olmsted* v. *Olmsted*, 216 U. S. 386; and that the full faith and credit clause does not require the enforcement of every right which has ripened into a judgment of another state or has been conferred by its statutes. See *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 160; *Alaska Packers Association* v. *Industrial Accident Commission*, No. 465, October Term, 1934, p. 8. But the room left for the play of conflicting policies is a narrow one. One State need not enforce the penal laws of another. *Huntington* v. *Attrill*, 146 U. S. 657. A State may adopt such system of courts and form of remedy as it sees fit. It may in appropriate cases apply the doctrine of *forum non conveniens*. *Anglo-Provision Co.* v. *Davis Provision Co.*, No. 1, 191 U. S. 373. But it may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject matter and the parties. *Christmas* v. *Russell*, 5 Wall. 290, 300. Compare *Atchison, Topeka & Santa Fe Ry.* v. *Sowers*, 213 U. S. 55; *Tennessee Coal, Iron & Railroad Co.* v. *George*, 233 U. S. 354. For the States of the Union, the constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity.

Here the nature of the cause of action brings it within the scope of the full faith and credit clause. The statutory liability sought to be enforced is contractual in character. The assessment is an incident of the incorporation. Thus the subject matter is peculiarly within the regulatory power of New York, as the State of incorporation. "So much so", as was said in *Converse* v. *Hamilton*, 224 U. S. 243, 260, "that no other State properly can be said to have any public policy thereon. And what the law of Wisconsin [New Jersey] may be respecting the relative rights and obligations of creditors and stockholders of corporations of its creation, and the mode and means of enforcing them, is apart from the question under consideration." Compare *Bernheimer* v. *Converse*, 206 U. S. 516, 532. In respect to the determination of

[a]Chambers v. Baltimore & Ohio R. R., 207 U. S. 142, is not to the contrary; there no claim was made under the full faith and credit clause.

liability for an assessment, the New Jersey stockholders submitted themselves to the jurisdiction of New York. For "the act of becoming a member [of a corporation] is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation." *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544, 551. Compare *Royal Arcanum* v. *Green*, 237 U. S. 531; *Hancock National Bank* v. *Farnum*, 176 U. S. 640; *McDermott* v. *Woodhouse*, 87 N. J. Eq. 615, 618, 619.[4] Obviously recognition could not be accorded to a local policy of New Jersey, if there really were one, of enabling all residents of the State to escape from the performance of a voluntarily assumed statutory obligation, consistent with morality, to contribute to the payment of the depositors of a bank of another State of which they were stockholders.

Fourth. The fact that the assessment here in question was made under statutory direction by an administrative officer does not preclude the application of the full faith and credit clause. If the assessment had been made in a liquidation proceeding conducted by a court, New Jersey would have been obliged to enforce it, although the stockholders sued had not been made parties to the proceedings, and, being nonresidents, could not have been personally served with process. *Converse* v. *Hamilton*, 224 U. S. 243, 252, 260. The reason why in that case the full faith and credit clause was held to require Wisconsin courts to enforce the assessment made in Minnesota was not because the determination was embodied in a judgment. Against the nonresident stockholders there had been no judgment in Minnesota. Wisconsin was required to enforce the Minnesota assessment because statutes are "public acts" within the meaning of the clause, *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 155; *Alaska Packers Association* v. *Industrial Accident Commission*, *supra*, p. 6; and because the residents of Wisconsin had, by becoming stockholders of a Minnesota corporation, submitted themselves to that extent, to the jurisdiction and laws of the latter State. Where a State has had jurisdiction of the subject matter and the parties, obligations validly imposed upon them by statute must, within the limitations above stated, be given full faith and credit by all the other States.

[4] See, too, Canada Southern Ry. v. Gebhard, 109 U. S. 527, 537-8; Hawkins v. Glenn, 131 U. S. 319, 329; Nashua Savings Bank v. Anglo-American Co., 189 U. S. 221, 229-230; Harrigan v. Bergdoll, 270 U. S. 560, 564.

The Superintendent is an independent executive on whom the legislature has conferred large responsibilities, compare *Isaac* v. *Marcus*, 258 N. Y. 257, 263-5; *Matter of Broderick*, 235 App. Div. 281; among them, the determination of the questions involved in stockholders' liability. He must decide whether there is a deficiency of assets which requires resort to that liability; and if so, what proportion of the full liability it is necessary to enforce; and when the assessments shall be paid. It is urged that unlike the assessment involved in *Converse* v. *Hamilton*, *supra*, that laid by the New York Superintendent is not conclusive as to its propriety and amount. The contention rests primarily upon a misconception of a provision in Section 80 of the Banking Law, to the effect that "the written statement of the superintendent, under his hand and seal of office, reciting his determination to enforce the individual liability or any part thereof, of such stockholders, and setting forth the value of the assets of such corporation and the liabilities thereof, as determined by him after examination and investigation, shall be presumptive evidence of such facts as therein stated." This provision does not declare, as a rule of substantive law, that the determination is open to attack in an action to enforce the stockholders' liability. It merely provides, as in the case of other official acts, a method of proof without the calling of witnesses. Thus it prescribes a rule of evidence; and may possibly affect the manner of pleading.[5] But with such matters we have here no concern. It is enough, for present purposes, that a complaint alleging the stock ownership of the defendants, the assessment, the demand, and failure to pay, together with the determination of the value of assets and liabilities, referred to in Section 80, sets forth a good cause of action.[6] *Broderick* v. *Aarron*, 147 N. Y. Misc. Rep. 854; *Broderick* v. *Betco Corp.*, 149 N. Y. Misc. Rep. 245; *Broderick* v. *American General Corp.*, 71 F. (2d) 864; compare *Broderick* v. *Stephano*, 314 Pa. 408; *Broderick* v. *McGuire*, 119 Conn. 83. Even if the administrative determination of the assessment made in New York is subject to attack in a suit brought there or in any other State, that fact would not justify New Jersey in denying to the Superintendent the right to bring this suit.

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[5]Compare Broderick v. McGuire, 119 Conn. 83, 101-103.

[6]Before the adoption of Section 80 by the Laws of 1914, c. 369, the Superintendent was required to allege and prove the facts necessitating the assessment. Cheney v. Scharmann, 145 App. Div. 456; see Matter of Empire City Bank, 18 N. Y. 199, 211-213. By the Laws of 1934, c. 494, further changes, of no importance here, have been made in this section.

Fifth. The Superintendent contends that his assessment is a "public act" within the meaning of the full faith and credit clause, and is entitled to receive in every other State of the Union, the same recognition accorded to it by the laws of New York. He insists that, while under the law of New York defenses personal to individual stockholders are open to them whenever and wherever sued, *Selig* v. *Hamilton*, 234 U. S. 652, 662-3, his determinations as to the propriety and amount of the assessment, in so far as they involve merely the exercise of judgment, are conclusive; and are not subject to review by any court, except on grounds for which equity commonly affords relief against administrative orders. He argues that his powers and duties in respect to the assessment of stockholders, and the proceeding to enforce liability therefor, are substantially the same as those imposed by the National Banking Act on the Comptroller of the Currency, *Van Tuyl* v. *Scharmann*, 208 N. Y. 53, 63; *Matter of Union Bank of Brooklyn*, 176 App. Div. 477, 485; *Broderick* v. *Aaron*, 151 Misc. 516, 523; and that, as to these, it has been settled by an unbroken line of authorities beginning with *Kennedy* v. *Gibson*, 8 Wall. 498, 505, that the Comptroller's determination is conclusive in an action at law to enforce the stockholders' liability; being subject, like other administrative orders, only to a direct attack for fraud or error of law by appropriate proceedings in equity.[7] *United States* v. *Knox*, 102 U. S. 422, 425. Whether this contention is sound, we have no occasion to consider now. See *Broderick* v. *Adamson*, 148 N. Y. Misc. Rep. 353, 369-371. It is sufficient to decide that, since the New Jersey courts possess general jurisdiction of the subject matter and the parties, and the subject matter is not one as to which the alleged public policy of New Jersey could be controlling, the full faith and credit clause requires that this suit be entertained.

Reversed.

Mr. Justice CARDOZO is of the opinion that the judgment should be affirmed.

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[7]Casey v. Galli, 94 U. S. 673, 681; National Bank v. Case, 99 U. S. 628, 634-5; DeWeese v. Smith, 106 Fed. 438, 445, aff'd, 187 U. S. 637; Murray v. Sill, 7 F. (2d) 589; Crawford v. Gamble, 57 F. (2d) 15; B. V. Emery & Co. v. Wilkinson, 72 F. (2d) 10; see Studebaker v. Perry, 184 U. S. 258, 266; Rankin v. Barton, 199 U. S. 228, 232. Compare Bushnell v. Leland, 164 U. S. 684; Korbly v. Springfield Inst. for Savings, 245 U. S. 330; Aldrich v. Campbell, 97 Fed. 663.